

BOOK REVIEW

ANGLO-AMERICAN EMPIRE AND THE CRISIS OF THE LEGAL FRAME (WILL THE REAL BRITISH EMPIRE PLEASE STAND UP?)

EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER. By Niall Ferguson. New York: Basic Books. 2004. Pp. xxix, 351. \$51.65.

CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830. By Daniel J. Hulsebosch. Chapel Hill: The University of North Carolina Press. 2005. Pp. i, 494. \$45.00.

A JURISPRUDENCE OF POWER: VICTORIAN EMPIRE AND THE RULE OF LAW. By R.W. Kostal. New York: Oxford University Press. 2005. Pp. xiii, 529. \$140.00.

THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11. By John Yoo. Chicago and London: The University of Chicago Press. 2005. Pp. xii, 366. \$29.00.

*Reviewed by John Fabian Witt**

Old-fashioned empire is suddenly everywhere. In the United States, discussions of empire used to look as much to what we now call “soft power” as to the seemingly atavistic technologies of high nineteenth-century imperial powers. McDonald’s and Coca-Cola, Microsoft and Intel — these were the purveyors of the distinctively American empire of commerce and markets.¹ Since 9/11, however, the traditional approach to empire has come to the fore with all the trappings: soldiers, invasions, occupations, and prisoners. Hard power is back, and so too are a set of difficult constitutional questions: about the Constitution and foreign affairs, about the significance of interna-

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¹ See, e.g., BENJAMIN R. BARBER, *JIHAD VS. MCWORLD* (1995); VICTORIA DE GRAZIA, *IRRESISTIBLE EMPIRE* (2005); *THE IMPERIAL TENSE: PROSPECTS AND PROBLEMS IN AMERICAN EMPIRE* (Andrew J. Bacevich ed., 2003); JOSEPH S. NYE, JR., *SOFT POWER* (2004).

tional law, and about the relationship of foreign affairs authority to domestic rights and powers, to mention only a few.²

Such questions, to be sure, were never far away. Issues such as the western expansion of the territory of the United States,³ the relative powers of the President and Congress in foreign affairs and war-making,⁴ the territorial applicability of the U.S. Constitution,⁵ and the relationship between domestic law and the law of nations⁶ have been recurrent features of American constitutional dialogue since the Founding.

It has been at least a century, however, stretching back to the Spanish-American War and its aftermath, since the model of empire was so hotly contested in American public life.⁷ Today, supporters and critics of American power alike seize on the example of empire to illustrate their claims. Analogies to empire serve alternately as arguments for the liberalizing effects of American global power, on one hand, and as anticolonialist critiques of American foreign policy, on the other.⁸

² A small sample of the books published on empire in the past few years includes ANDREW J. BACEVICH, *AMERICAN EMPIRE: THE REALITIES AND CONSEQUENCES OF U.S. DIPLOMACY* (2002); NICHOLAS B. DIRKS, *THE SCANDAL OF EMPIRE: INDIA AND THE CREATION OF IMPERIAL BRITAIN* (2006); HAROLD JAMES, *THE ROMAN PREDICAMENT: HOW THE RULES OF INTERNATIONAL ORDER CREATE THE POLITICS OF EMPIRE* (2006); CHARLES S. MAIER, *AMONG EMPIRES: AMERICAN ASCENDANCY AND ITS PREDECESSORS* (2006); and BERNARD PORTER, *EMPIRE AND SUPEREMPIRE: BRITAIN, AMERICA AND THE WORLD* (2006).

³ See GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* (2004); PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* (1987); Sanford Levinson, *Why the Canon Should Be Expanded To Include The Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000).

⁴ See JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

⁵ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197 (1996).

⁶ See Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002); Vicki C. Jackson, *The Supreme Court, 2004 Term—Comment: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005).

⁷ See generally WILLIAM APPLEMAN WILLIAMS, *THE ROOTS OF THE MODERN AMERICAN EMPIRE* 43–46, 405–28 (1969) (describing controversies over the Spanish-American War).

⁸ For enthusiasts of American empire, see MAX BOOT, *THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER* (2002); NIALL FERGUSON, *COLOSSUS: THE PRICE OF AMERICA'S EMPIRE* (2004); ROBERT D. KAPLAN, *IMPERIAL GRUNTS: THE AMERICAN MILITARY ON THE GROUND* (2005); and Max Boot, *The Case for American Empire*, WKLY. STANDARD, Oct. 15, 2001, at 27. For critics, see MICHAEL HARTDT & ANTONIO NEGRI, *EMPIRE* (2000). A third view defends American global power but rejects the label “empire.” See, e.g., MICHAEL MANDELBAUM, *THE CASE FOR GOLIATH: HOW AMERICA ACTS AS THE WORLD'S GOVERNMENT IN THE TWENTY-FIRST CENTURY* 1–6 (2005).

The Supreme Court's post-9/11 terrorism cases offer a leading example. Lawyers for detainees have rested their claims on historical traditions of habeas corpus that purport to extend back into the long history of British imperial constitutionalism.⁹ Bush Administration supporters, by contrast, have responded that the legacy of British imperialism cuts precisely the opposite way and supports the Administration's claims to executive authority in the struggle against terrorism.¹⁰ Indeed, all sides in the debate over empire claim to be champions of the rule of law in their mobilizations of the history of empire. For empire's critics, the long history of empire in the West (stretching back to Rome) has been one in which republican rule-of-law guarantees inevitably give way to imperial authoritarianisms.¹¹ For empire's advocates, empires have spread order around the world and brought the rule of law to places where once only anarchy governed.¹²

The law of empire has moved front and center in American public discourse in significant part because arguments among American lawyers, politicians, and public intellectuals offer a startlingly close replay of the debates that occupied Victorian jurists a century and a half ago at the height of the British Empire. To be sure, most attempts to appropriate the legacy of the Empire in contemporary U.S. constitutionalism are patched together from fantasy and fiction. The contending sides typically offer little more than highly idealized versions of the historical practices they purport to describe. The traditions of Anglo-American constitutionalism are alternately said to have allocated more formal power to the Crown than they actually did and to have imposed constraints on imperial power that they almost certainly never did. Fantasy and fiction notwithstanding, however, the Anglo-American law of empire has remained strikingly similar over the past

⁹ See, e.g., Brief for the Bar Human Rights Comm. of the Bar of Eng. & Wales & the Commonwealth Lawyers Ass'n as Amici Curiae in Support of the Petitioner, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 53975, at *6-16; Petitioners' Brief on the Merits, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334, 03-343), 2004 WL 162758, at *23-24; Brief Amici Curiae of Legal Historians Listed Herein in Support of the Petitioners, *Rasul*, 124 S. Ct. 2686 (Nos. 03-334, 03-343), 2004 WL 96756, at *6-10; Brief for the Commonwealth Lawyers Ass'n as Amicus Curiae in Support of the Petitioners, *Rasul*, 124 S. Ct. 2686 (Nos. 03-334, 03-343), 2004 WL 73258, at *4-10; see also Brief of Lawrence M. Friedman et al. as Amici Curiae in Support of Petitioner, *Hamdan*, 126 S. Ct. 2749 (No. 05-184), 2006 WL 53971, at *10-16 (using the Barbary Wars as a historical example to illustrate the United States's adherence to international laws and customs).

¹⁰ See, e.g., Brief Amicus Curiae of Law Professors et al. in Support of Respondents, *Rasul*, 124 S. Ct. 2686 (Nos. 03-334, 03-343), 2004 WL 419453.

¹¹ Classic studies include PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* (1987), and J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT* (1975). For one of many recent studies, see JAMES, *supra* note 2.

¹² See, e.g., Joseph S. Nye, Jr., *The American National Interest and Global Public Goods*, 78 INT'L AFFAIRS 233, 241 (2002); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 786-87 (2004).

150 years, its landmarks remarkably little changed by the winds of time. Like their nineteenth-century British predecessors, American constitutionalists now debate the allocation of foreign affairs powers between the legislative and executive branches. They debate the extent to which such allocations of power are susceptible to judicial review. They debate the merits of emergency exceptions to constitutional systems.

Properly understood, the structure of Anglo-American empire — what eighteenth-century English lawyers would have called its constitution — offers one way of making sense of the Supreme Court's approach in cases such as *Hamdan v. Rumsfeld*,¹³ *Hamdi v. Rumsfeld*,¹⁴ and *Rasul v. Bush*,¹⁵ a way that neither the Bush Administration nor its opponents have suggested. There is at least one critical difference between the constitutionalisms of the twenty-first and nineteenth centuries: the culture of American foreign affairs constitutionalism is radically more polarized than the constitutionalism of the nineteenth-century British Empire; it includes claims of unilateral executive authority, on one hand, and judicially enforceable individual constitutional rights, on the other. Its British predecessor, by contrast, rejected both executive unilateralism and judicially enforceable constitutional rights in favor of a model that placed virtually all questions in the hands of Parliament.¹⁶ What the Court has done in the past several years is rein in the polarizing outliers and restore something approaching the Anglo-American constitutional-imperial debates of old.

Much as Victorian British constitutionalism vested ultimate authority in Parliament, the early rounds of post-9/11 decisions by the Supreme Court appear to have allocated considerable power to Congress.¹⁷ The Military Commissions Act of 2006,¹⁸ which among other things purports to establish statutory standards for the trial of detainees,¹⁹ will likely soon test this approach. Yet if the historical analogy of empire is properly understood, the prospects for a harmonious constitutionalism of empire in a Victorian key are both less propitious and

¹³ 126 S. Ct. 2749 (2006).

¹⁴ 124 S. Ct. 2633 (2004).

¹⁵ 124 S. Ct. 2686 (2004).

¹⁶ See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 287–94 (9th ed. 1952).

¹⁷ So far, the Court's decisions have tracked the historical patterns traced by Samuel Issacharoff and Richard Pildes. See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 161 (Mark Tushnet ed., 2005).

¹⁸ Pub. L. No. 109-366, 120 Stat. 2600 (2006) (Westlaw) (to be codified in scattered sections of 10 U.S.C.).

¹⁹ See *id.* §§ 948a–950w, 120 Stat. at 2600–30.

more important than at first glance they appear. If the real British Empire would please stand up, we would see a legal regime that provided precious few answers to its own critical questions. It is all the more daunting, then, that the constitution of empire may well be the most effective tool history offers us for limiting the abuses that seem to come in empire's train.

This essay reviews four books that, among the spate of books on empire in the past few years, shed especially illuminating light on the law of Anglo-American empire during the past three centuries. Part I describes the central tenets of one of the new poles in the early-twenty-first-century constitution of empire: the idea of the imperial executive as advanced by the constitutional lawyer John Yoo in his book, *The Powers of War and Peace*.²⁰ Part II turns to two historico-imperial analogies that animate arguments for the imperial executive; in particular, Part II addresses lawyer-historian Daniel Hulsebosch's *Constituting Empire*²¹ and historian Niall Ferguson's *Empire*²² in order to assess the strengths and limits of analogies between the governance of the British Empire and the idea of the imperial executive. Part III takes up *A Jurisprudence of Power*,²³ a book by historian R.W. Kostal on the martial law controversy in Jamaica in the 1860s. Kostal's implicit suggestion is that the overarching continuity in the Anglo-American law of empire over the past 150 years has been the centrality of legal language in moral argument about empire and its virtues, vices, and exigencies. Part IV compares the British imperial constitution with its American counterpart in the early twenty-first century.

The conclusion relates the constitution of the British Empire to the U.S. Supreme Court's efforts — successful or not, we cannot yet know — to rein in the poles of the debate and to establish boundaries for the legal frame of Anglo-American empire. The Court's great challenge is that the institutions and discourse of American constitutional law make available a much wider array of possible moves in constitutional argument than the U.S. Constitution's British antecedents ever did.

I. THE POWERS OF WAR AND PEACE

No one has deployed the imperial theory of American foreign affairs constitutionalism more elaborately and to greater effect than John

²⁰ JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

²¹ DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830* (2005).

²² NIALL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* (2004).

²³ R.W. KOSTAL, *A JURISPRUDENCE OF POWER: VICTORIAN EMPIRE AND THE RULE OF LAW* (2005).

Yoo, a former lawyer in the Justice Department's Office of Legal Counsel and a law professor at the University of California at Berkeley.²⁴ For a decade now, Yoo has helped lead an energetic assault on the conventional wisdom of the law of foreign affairs in areas such as the law of war,²⁵ the law of treaties,²⁶ the constitutional constraints on multilateralism,²⁷ the domestic status of international law,²⁸ and the law of international bodies such as the United Nations.²⁹ After 9/11, these topics took center stage in American law. Yoo's expertise and his position in the Justice Department made him a principal actor in the renewed debates about the Executive and foreign affairs. As such, his role in shaping the Bush Administration's legal strategy is well known. His book, *The Powers of War and Peace*, encapsulates a decade of work in the field and has become a leading (if deeply flawed) statement of the law of the so-called Bush doctrine of preemptive war.³⁰

The challenges advanced by *The Powers of War and Peace* to the conventional scholarly wisdom in the law of foreign affairs have been rehearsed many times by supporters and critics alike.³¹ Yoo's ideas make up a tightly bound package of arguments. In each of the areas he addresses (with a few interesting exceptions), Yoo's contention is that the executive branch has broad constitutional powers that cannot

²⁴ See JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 18–20 (2006).

²⁵ See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

²⁶ See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001); John C. Yoo, *Treaties and Non-Self-Execution*, 94 AM. SOC'Y INT'L L. PROC. 47 (2000); John Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999).

²⁷ See John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673 (2000).

²⁸ See Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291 (2005); John Yoo, *Peeking Abroad?: The Supreme Court's Use of Foreign Precedents in Constitutional Cases*, 26 U. HAW. L. REV. 385 (2004).

²⁹ See John C. Yoo, *Force Rules: UN Reform and Intervention*, 6 CHI. J. INT'L L. 641 (2006); John C. Yoo & Will Trachman, *Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations*, 5 CHI. J. INT'L LAW 379 (2005).

³⁰ See WHITE HOUSE, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 6 (2002), available at <http://www.whitehouse.gov/nsc/nss.html>.

³¹ For prominent criticisms of Yoo's work, see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005); and Cass R. Sunstein, *The 9/11 Constitution*, NEW REPUBLIC, Jan. 16, 2006, at 21. For supporters, see David J. Bederman, *Book Reviews*, 100 AM. J. INT'L L. 490 (2006) (reviewing YOO, *supra* note 20)), and David B. Rivkin Jr. & Carlos Ramos-Mrosovsky, *Rights and Conflicts*, NAT'L REV., Nov. 21, 2005, at 48 (reviewing same).

be overridden: not by congressional action or judicial intervention, and certainly not by treaty obligations or international legal norms.

On the question of the executive war power, Yoo contends that the Constitution allocates the power to make war to the executive branch. According to Yoo's account, a heady but disorganized decade of revolutionary excess led the Framers of the Constitution to restore what he calls the "customary constitutional balance" of the eighteenth-century English government, a balance in which the monarchy had virtually exclusive authority over foreign affairs and war.³² (Yoo surely savors the irony that his right-leaning Thermidorian view of the Constitution matches Charles Beard's famous left-leaning Thermidorian critique from a century ago.³³) As a result, Yoo contends, the clauses of Article II vesting the executive power in the President³⁴ and making the President "Commander in Chief"³⁵ allocate a broad, unenumerated power in foreign affairs and war to the executive branch, much like the power Yoo tells us the Crown enjoyed in traditional British constitutionalism.³⁶

Yoo describes the enumerated foreign affairs powers that the Constitution allocates to Congress as quite narrow, consistent with the broad authority he contends the Constitution confers on the Executive. In Yoo's view, for example, the clause of Article I allocating to the legislature the power to declare war³⁷ merely authorizes Congress to initiate formal warfare. The clause thereby prevents the Executive from unilaterally plunging the nation into an all-out war (or, as Yoo calls it, "total war"), to which all of the duties and obligations of war under domestic law and the law of nations attach.³⁸ But Congress's war power does nothing (Yoo insists) to limit the Executive's much broader authority to initiate and wage wars short of formal or total war.³⁹ To be sure, Article I also gives Congress the power to "make Rules concerning Captures on Land and Water";⁴⁰ to "raise and support Armies";⁴¹ to "provide and maintain a Navy";⁴² to "make Rules for the

³² YOO, *supra* note 20, at 141.

³³ See CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (Transaction Publishers 1938) (1913).

³⁴ U.S. CONST. art. II, § 1, cl. 1.

³⁵ *Id.* art. II, § 2, cl. 1.

³⁶ See YOO, *supra* note 20, at 18.

³⁷ U.S. CONST. art. I, § 8, cl. 11.

³⁸ YOO, *supra* note 20, at 120, 151–52. The salient differences between armed conflict accompanied by a congressional declaration of war and armed conflict initiated by the Executive alone with no such accompanying declaration are never entirely clear from Yoo's account.

³⁹ See *id.* at 152.

⁴⁰ U.S. CONST. art. I, § 8, cl. 11.

⁴¹ *Id.* art. I, § 8, cl. 12.

⁴² *Id.* art. I, § 8, cl. 13.

Government and Regulation of the land and naval Forces";⁴³ to "provide for calling forth the Militia";⁴⁴ and to "provide for organizing, arming, and disciplining, the Militia."⁴⁵ Yoo contends, however, that these specifically enumerated powers carve out only narrow exceptions from the British Empire-inspired background of a plenary Commander-in-Chief authority vested in the Executive. Indeed, the argument goes even further. As Yoo made clear in memoranda written for the Bush Administration in 2002, the theory holds that congressional legislation purporting to interfere with the inherent power of the Executive to command the military would be unconstitutional.⁴⁶ The Commander-in-Chief powers drawn from the experience of empire are not subject to limits imposed by Congress or set out in either treaties or customary international law.⁴⁷

Yoo identifies additional broad executive authority in the making, interpretation, and abrogation of treaties.⁴⁸ Once again, in Yoo's account, the Framers' constitution restored the plenary executive power in foreign affairs characteristic of the English constitution.⁴⁹ Like the eighteenth-century British monarchs, Yoo contends, the President may terminate or suspend treaties unilaterally. Yoo writes that the President may decline to ratify treaties even after they have been approved by the Senate. And Yoo's reading of the law gives the President wide discretion to interpret treaties. Congress's powers are accordingly limited.⁵⁰

This is not to say that Yoo believes Congress is without power to check the Executive in matters of foreign affairs. Yoo's position is that congressional power in this domain is actually quite robust, but that it is limited to several distinct constitutional devices. The most impor-

⁴³ *Id.* art I, § 8, cl. 14.

⁴⁴ *Id.* art I, § 8, cl. 15.

⁴⁵ *Id.* art I, § 8, cl. 16.

⁴⁶ See Letter from John C. Yoo, Deputy Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 218 (Karen J. Greenberg & Joshua L. Dratel eds., 2005); Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *THE TORTURE PAPERS*, *supra*, at 172, 200-07 [hereinafter August 2002 Memorandum].

⁴⁷ See August 2002 Memorandum, *supra* note 46, at 203 (discussing the Executive's independence from congressional regulation); YOO, *supra* note 20, at 172-73 (discussing the Executive's independence from international law).

⁴⁸ See YOO, *supra* note 20, at 183-84, 190-98.

⁴⁹ See *id.* at 31-45.

⁵⁰ See *id.* at 184, 190-98. Yoo does not contemplate the possibility that allocating treaty termination power to the Executive but not interpretive authority might bolster political accountability in foreign affairs. Yoo's position on the executive power to interpret treaties was impliedly rejected in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), in which the Court construed the Geneva Convention (as implemented by the Uniform Code of Military Justice, 10 U.S.C.A. §§ 801-946 (West 1998 & Supp. 2006)) as barring the President's unilateral implementation of military tribunals. See *Hamdan*, 126 S. Ct. at 2793.

tant such mechanism is the power of the purse. Through its spending power, Yoo insists, Congress (like the eighteenth-century Parliament before it) can simply starve the Executive's foreign affairs adventures. The impeachment power gives Congress further oversight power in the realm of foreign affairs, as does Congress's legislative authority over domestic affairs.⁵¹

Moreover, Yoo identifies controversial limits on the executive branch's powers in three areas. First, Yoo concludes that treaty obligations entered into by the Executive and concurred in by two-thirds of the Senate are not self-executing parts of domestic American law.⁵² He reaches this conclusion against the weight of the text of the Supremacy Clause, which describes treaties as "the supreme Law of the Land,"⁵³ and also against the force of rulings by the Supreme Court to the contrary.⁵⁴ Interestingly, Yoo's claim that treaties are not self-executing represents a limit on executive power. Yoo's approach would place sharp limits on the extent to which the Executive could use treaties to create binding legal rules absent implementing legislation by the full Congress. Yoo warns that any other approach to understanding the treaty power would create "an almost unlimited authority to legislate" outside of the formal and often cumbersome requirements of the full Congress.⁵⁵

By the same token, the Constitution's finely arranged system for enacting domestic legislation prohibits the creation of treaties by congressional-executive agreement rather than through Senate ratification. Congressional-executive agreements involve the full Congress, to be sure; indeed, they enact public laws. But they allow the Executive and Congress to create treaty obligations without the agreement of two-thirds of the Senate, as is required for the approval of treaties,⁵⁶ and even over the objection of the Executive if a congressional supermajority overrides the Executive's veto.⁵⁷ The risk, Yoo suggests, is that congressional-executive agreements may undermine the broad allocation of foreign affairs authority to the Executive. Even when the holder of the executive office prefers a congressional-executive agreement as the route to ratifying a treaty, the Executive cannot choose

⁵¹ See YOO, *supra* note 20, at 86. Yoo rejects the longstanding objection that political dynamics will effectively prevent Congress from removing funding from under the feet of troops committed to a foreign conflict by the Executive. See *id.* at 159.

⁵² See *id.* at 215-49.

⁵³ U.S. CONST. art. VI, § 1, cl. 2.

⁵⁴ See Vázquez, *supra* note 31, at 2189 n.143, 2190 n.144 (collecting cases on self-executing treaties).

⁵⁵ YOO, *supra* note 20, at 223.

⁵⁶ U.S. CONST. art. II, § 2, cl. 2.

⁵⁷ *Id.* art. I, § 7, cl. 2.

that route because it threatens to undermine the power of the executive branch.⁵⁸

The third limit on the imperial executive is a limitation on multilateralism. Yoo's foreign affairs analysis leads him to conclude that the Constitution does not permit the Executive to commit troops to serve under foreign command.⁵⁹ The Appointments Clause,⁶⁰ Yoo argues, prohibits the President from delegating power to individuals who are independent of the President's control.⁶¹ When President Clinton placed U.S. troops under the command of foreign officers during the humanitarian intervention in Kosovo, for example, the delegation of command violated the Constitution.⁶² Article II of the Constitution, it seems, not only authorizes the imperial executive but also precludes its ability to act multilaterally.

What is most interesting about Yoo's book is not the particular arguments it makes but its sources and its underlying logic. Others have taken Yoo's arguments to task, Cass Sunstein and Jeremy Waldron recently among them.⁶³ There is not much need to add here to the criticisms that have been made elsewhere. Yoo egregiously fails to present counterevidence against his claims.⁶⁴ His arguments engage in forensic bootstrapping, as when he spuriously converts Wilson's and Madison's statements that treaties "may" or "sometimes" require congressional implementation into claims that treaties are not self-enforcing.⁶⁵ Yoo's arguments are repeatedly question-begging, as when he insists that treaties are not self-implementing because the treaty power must comport with "the distribution of powers between the general and state governments."⁶⁶ The book's claims are plagued by inconsistency.⁶⁷

⁵⁸ See YOO, *supra* note 20, at 270–78. The exception (which may swallow the rule) is that congressional-executive agreements are permitted to create treaty obligations in areas in which Congress is granted plenary constitutional authority by Article I, Section 8 of the Constitution. One such area is the regulation of foreign commerce. See *id.* at 274.

⁵⁹ See *id.* at 173–81.

⁶⁰ U.S. CONST. art. II, § 2, cl. 2.

⁶¹ See YOO, *supra* note 20, at 177.

⁶² See *id.* at 175–81.

⁶³ See Waldron, *supra* note 31; Sunstein, *supra* note 31.

⁶⁴ See Sunstein, *supra* note 31, at 23–24.

⁶⁵ See YOO, *supra* note 20, at 119, 136.

⁶⁶ *Id.* at 222 (quoting *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840)); see also *id.* at 226 (noting with disapproval that if treaties created binding domestic law, federal law could be made without bicameral approval in the Congress and presentment to the President).

⁶⁷ For example, Yoo contends that congressional participation in treaty implementation encourages transparency, reasoned discussion of important issues, political stability, and "broader political acceptance." *Id.* at 224. Yet all of these virtues are undermined by Yoo's arguments for a strong executive branch in foreign affairs. Preservation of these values seems to concern Yoo most when that preservation obstructs the implementation of treaty norms. See *id.* at 226. Consider also Yoo's shifting uses of evidence from the Antifederalists and Federalists during the rati-

And yet making sense of the argument for which Yoo's work has come to stand is vitally important. The first round of histories concerning foreign affairs in the United States after 9/11 suggests that the contested emergence of a radically expansive new theory of executive power may be among the lasting contributions of 9/11 to American constitutionalism.⁶⁸ If we are to understand the ideas that animate the imperial executive, there are few better places to start than Yoo's book.

Cynics, of course, will tell us that ideas do not matter so much as politics. All that matters in understanding Yoo's package of positions, critics suggest, is the political goals of the Bush Administration and the cadre of political lawyers who staffed the Administration's legal posts in the months and years following 9/11. It is hardly surprising that such cynics abound. *The Powers of War and Peace* seeks to advance the Administration's aspirations to broad executive power in foreign affairs while holding off the kinds of domestic regulatory authority that the Bush Administration purports to dislike. Similarly, the book advances an argument for an executive power over foreign affairs that is virtually unlimited except when it comes to the kinds of multilateralism that the Bush Administration disdains. Nonetheless, critiques of Yoo's ideas as pure politics are almost certainly misguided.

II. THE ANALOGY TO THE BRITISH EMPIRE

Lurking alongside debates over the imperial executive is a hotly contested historical analogy between the United States and the British Empire. Great Britain, after all, was the modern world's first hegemon, and some today would have the United States recast itself in its image. In particular, defenders of a strong American presence in the world have recently become enamored of two features said to have characterized the British Empire: its constitutional structure (as interpreted, almost certainly incorrectly, by the proponents of American

fyng debates in the fall of 1787. Yoo relies heavily on the Antifederalists' strategic descriptions of the Constitution as creating an executive branch with what was to their lights dangerously broad authority akin to that of the British monarchy; such Antifederalist critiques become evidence for Yoo that the Constitution does indeed embrace a powerful Executive modeled on the monarchy of the British constitution, notwithstanding Federalist protestations to the contrary. See *id.* at 111–14, 122–24. But when the Antifederalists (using precisely the same strategy they had employed in comparing the Executive to the British monarchy) identified the treaty power as self-executing and thus a threat to the legislative power vested in the House of Representatives, Yoo prefers the protestations of their Federalist opponents. See *id.* at 115–20. The strategic imperatives of the ratification debates ensured that there would be language from one side or the other on which Yoo would be able to draw. Yoo seems simply to draw his evidence from whichever side happened to favor the proposition he seeks to sustain.

⁶⁸ See, e.g., GEORGE PACKER, *THE ASSASSINS' GATE* (2005); Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, NEW YORKER, July 3, 2006, at 44; Jeffrey Rosen, *Power of One*, NEW REPUBLIC, July 24, 2006, at 8, 10.

power), and its role as global policeman during the period of the so-called Pax Britannica.

A. *The Structure of the Empire*

In Yoo's account, American foreign affairs constitutionalism was modeled explicitly on its British predecessor. "The Framers were former citizens of the British Empire,"⁶⁹ Yoo claims, who solved the founding era's foreign affairs questions "by explicit analogy to the British model."⁷⁰ That model, Yoo contends, was one in which the monarchy held virtually plenary power in the realm of foreign affairs. "The eighteenth-century English monarch," Yoo writes, "was commander in chief of the armed forces and possessed exclusive power to enter into treaties, to declare war, and to raise and regulate the army and navy."⁷¹ This system "inform[ed]" the Framers' debates.⁷² Indeed, Yoo asserts that "the Framers intended to adopt the traditional system they knew," a system in which "foreign affairs remained an executive power."⁷³

The problem is that the Framers almost certainly knew no such system. Legal historian Daniel Hulsebosch's recent book, *Constituting Empire*, is wonderfully revelatory on this score. Judging from Hulsebosch's account of constitutional politics in New York from the colonial period into the early republic, Yoo seems to have at least one thing right: American constitutionalism is inescapably the outgrowth and continuation of the British imperial project. As Hulsebosch's nuanced account puts it, American constitutionalism was "conditioned" by the experience and the lessons of the sprawling empire from which it emerged.⁷⁴ Indeed, Hulsebosch contends that Anglo-American constitutionalism more generally arose out of the imperial experience: "[o]verseas expansion and the English constitution developed simultaneously and reciprocally, each structuring the other."⁷⁵ Even the common law itself — conceived as a body of rights rather than as a set of interwoven jurisdictions linked to the Crown — emerged in the imperial experience as settlers and colonists exported the substantive law of the common law courts outside of its initial jurisdictional setting.⁷⁶

⁶⁹ YOO, *supra* note 20, at 31.

⁷⁰ *Id.* at 167.

⁷¹ *Id.* at 53.

⁷² *Id.* at 54.

⁷³ *Id.* at 88.

⁷⁴ HULSEBOSCH, *supra* note 21, at 143.

⁷⁵ *Id.* at 15.

⁷⁶ *See id.* at 31–32.

In turn, constitutionalism and the common law provided the language and the mechanics of empire.⁷⁷

But this is where the similarities between Hulsebosch's and Yoo's accounts end. For as Hulsebosch brilliantly describes, the constitution of the British Empire was rarely settled and almost always hotly contested. There were, Hulsebosch tells us, many constitutions of empire in the eighteenth-century British Atlantic, at least three of which played themselves out in the American Revolution. First was the constitution of the Crown's imperial agents. This is essentially the model of the British Empire that Yoo champions. According to the Crown's imperial agents in North America, colonies were "subsidiary unit[s]" of an empire in which royal prerogative was the dominant power.⁷⁸ Under this theory of the structure of the British Empire, Parliament's authority paled in comparison to the authority of the King and his agents.⁷⁹

But the imperial agents' theory of the Empire was only one theory among many. The American creole elite held a counter-theory of the imperial constitution, one that harkened back to the ideas of Sir Edward Coke in the seventeenth-century common law.⁸⁰ In particular, the creole theory espoused an ancient constitution of English rights and liberties to which the King and his Parliament were bound. This, of course, was one of the constitutional idioms that would be expressed most strongly in the 1760s and 1770s as the American Revolution approached.⁸¹

A third view crystallized in the middle of the eighteenth century. It held simply that Parliament was supreme over the Crown on one hand and over the accumulated customs of the common law on the other. According to the parliamentary supremacy school, imperial agents and the colonies' creole elite were clinging to competing sets of equally anachronistic ideas about the English constitution, one set rooted in the now-constrained royal prerogative, the other in Coke's shadowy seventeenth-century ideas about constitutional constraints on Parliament. In the colonies, as at home, the English Parliament was simply the sovereign.⁸²

In the ever-changing, always-contested context of the imperial constitution, it is little wonder that the British constitutional tradition

⁷⁷ See *id.* at 8.

⁷⁸ HULSEBOSCH, *supra* note 21, at 77.

⁷⁹ See *id.* at 76–78.

⁸⁰ See *id.* at 29–32.

⁸¹ See *id.* at 84–86, 90–96; see also Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157 (1976).

⁸² See HULSEBOSCH, *supra* note 21, at 134. Hulsebosch also describes a fourth, shadowy approach to the constitution of the British Empire, which he associates with the settlers on the colonial frontier. See *id.* at 101–04.

rarely yielded clear answers to the controversies of the empire. Hulsebosch does not go so far as his colleague John Philip Reid, who contends that the British constitution was “whatever could be plausibly argued and forcibly maintained.”⁸³ But Hulsebosch’s constitution (like Reid’s) was susceptible to many different interpretations and open to many competing claims. If the law of empire was “imperial and integrative” in one time and place, it quickly proved “provincial and disintegrative” in another, as competing factions of imperial agents and creole elites vied for the soul of the constitution.⁸⁴ As the historian and lawyer Mary Sarah Bilder has recently explained, the basic principles of empire were rarely settled. Indeed, on Bilder’s reading (a reading with which Hulsebosch seems to concur), the absence of certainty and resolution in the law of empire was critical to the workings of an empire that valued “pragmatism and flexibility” even at the cost of uncertainty.⁸⁵

Martial law provides a good example of the kind of legal indeterminacy and ambiguity that historians like Hulsebosch, Reid, and Bilder have found. Martial law was an imperial practice with multiple traditions. Creole elites contended that the common law and the British constitution prohibited military court jurisdiction over civilians or at the very least over British civilians. They could even cite to common law authorities and parliamentary legislation suggesting as much. But the imperatives of empire led military authorities to try civilians in military courts throughout the American Revolution. Imperial doctrine and imperial practice ran against one another, and in the ancient, custom-based, and almost always ambiguous constitution of the common law, who was to say which better embodied the constitution’s view of martial law?⁸⁶

Hulsebosch persuasively argues that the ambivalences of the law of empire stemmed from a deep tension in British imperial practice “between the rule of law and the expansion of rule.”⁸⁷ The tension ran through the law of empire, and it animated Britain’s conflicts with local elites in the North American colonies. Hulsebosch argues further that the tension survived the American Revolution and shaped American constitutionalism for a century to come. Here he is slightly less successful in his presentation, though not because he is wrong. Ex-

⁸³ John Phillip Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 N.Y.U. L. REV. 1043, 1087 (1974).

⁸⁴ HULSEBOSCH, *supra* note 21, at 10.

⁸⁵ MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 7 (2004); see also Lauren Benton, *Constitutions and Empires*, 31 L. & SOC. INQUIRY 177 (2006) (reviewing Bilder’s book and commenting more generally on the relationship between empires and constitutions).

⁸⁶ See HULSEBOSCH, *supra* note 21, at 157–58.

⁸⁷ *Id.* at 10.

pansion and the imperial questions it occasioned remained central in American constitutionalism well into the twentieth century.⁸⁸ Yet Hulsebosch's focus on New York — wonderful as it is for his treatment of the eighteenth century — does not give us an especially good view of the new questions of empire that arose somewhat further west in the first decades of the nineteenth century.

For the eighteenth century, Hulsebosch's work makes abundantly clear just how thin the imperial executive account of the British constitution really is. Many of the difficulties of the imperial executive argument appear on its face. Yoo, for example, inadvertently makes clear that the British constitution granted far more foreign affairs power to Parliament than he means to suggest. Blackstone's view of parliamentary power (which Yoo quotes⁸⁹) was that it was "sovereign and uncontrol[la]ble" in matters "ecclesiastical, or temporal, civil, military, maritime, or criminal."⁹⁰ Yoo describes these powers as "domestic" in character,⁹¹ but it would be hard to craft a more sweeping definition of the legislative power. From the Restoration onward, Parliament took on progressively greater authority in areas that had once been largely under the control of the Crown, especially foreign affairs. Beginning with its power of the purse, the House of Commons slowly increased its authority such that by the time of the American Revolution, as the historian H.M. Scott has recently observed, the ministers "controlled British diplomacy."⁹² The transformation of British government and the erosion of the Crown's executive power thus came before the American Revolution, not (as Yoo contends) after it.⁹³ Indeed, as Hulsebosch notes, after the Revolution the authority of the Crown's agents in places like India was if anything substantially increased to prevent additional outbreaks of colonial resistance.⁹⁴ To be sure, Yoo's favored power of the purse was the route Parliament took in establishing the ministry system. But once Parliament adopted that course, its power in the realm of foreign affairs quickly outstripped that of the Crown.

If Congress were to adopt a stance on the power of the purse as aggressive as the one taken by the eighteenth-century British Parliament, there is good reason to suspect that Yoo would find constitutional grounds to object. "It is subject to serious constitutional question,"

⁸⁸ See Levinson, *supra* note 3, at 251–52.

⁸⁹ YOO, *supra* note 20, at 43.

⁹⁰ WILLIAM BLACKSTONE, 1 COMMENTARIES *156.

⁹¹ YOO, *supra* note 20, at 43.

⁹² H.M. SCOTT, BRITISH FOREIGN POLICY IN THE AGE OF THE AMERICAN REVOLUTION 8 (1990).

⁹³ See E.R. Turner, *Parliament and Foreign Affairs, 1603–1760*, 34 ENG. HIST. REV. 172, 196–97 (1919).

⁹⁴ See HULSEBOSCH, *supra* note 21, at 168.

Yoo recently wrote elsewhere, "whether Congress can use the appropriations power to interfere with areas of plenary presidential power."⁹⁵ It is perhaps unsurprising that Yoo should think this: advocates of broad executive authority have made such arguments against conditional funding and other uses of Congress's power of the purse for years.⁹⁶ But in Yoo's hands, the argument against conditional funding is peculiarly arresting. In his book and in his earlier articles, Yoo repeatedly relies on the congressional spending power to assure his critics that there are constitutional checks on the imperial executive.⁹⁷ If in the end the power of the purse were itself tightly hemmed in by constitutional limits, then we would truly be in a brave new world of executive power.

B. *Pax Britannica / Pax Americana*

The imperial executive theory relies just as heavily on a second dimension of British imperial history. This second dimension is the British Empire as liberal world hegemon. In looking toward a Pax Americana that might reproduce the ostensible virtues of the long-lost Pax Britannica, a growing chorus of voices in recent years purports to have rediscovered the virtues of empire in the liberal achievements of the British Empire.⁹⁸ Yoo, for example, cites the British Empire's successes in ending the slave trade and abolishing slavery.⁹⁹ Others note the British role in eliminating the practice of *sati*, in which Hindu widows in India immolated themselves upon the deaths of their husbands.¹⁰⁰ Of special interest here is the British Empire's success in combating the problem of piracy on the high seas. The analogy to terrorism is clear.¹⁰¹ What the British did against nefarious transnational slave traders and pirates on the high seas, goes the liberal hegemon theory, the United States may perhaps now be able to do against the similarly stateless forces of global terrorism. Creating the constitu-

⁹⁵ John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1202 (2004).

⁹⁶ See, e.g., Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833 (1994); J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162.

⁹⁷ See, e.g., YOO, *supra* note 20, at 22.

⁹⁸ See, e.g., KAPLAN, *supra* note 8; Boot, *supra* note 8.

⁹⁹ Yoo, *supra* note 29, at 654.

¹⁰⁰ See, e.g., FERGUSON, *supra* note 22, at 144-46. On *sati*, see generally SATI, THE BLESSING AND THE CURSE: THE BURNING OF WIVES IN INDIA (John Stratton Hawley ed., 1994).

¹⁰¹ See Joseph S. Nye, Jr., *The American National Interest and Global Public Goods*, 78 INT'L AFF. 233, 242 (2002).

tional conditions for the emergence of such a United States is therefore at the heart of the imperial executive project.¹⁰²

Recent thinking on the possibility of a Pax Americana is animated in significant part by the highly abstract game theory model of international relations known as the theory of public goods. The theory of public goods — readily familiar to economists — is that if a good is nonrivalrous (consumption by one party does not preclude consumption by others) and nonexclusive (its provider cannot successfully exclude others from taking advantage of it), then uncoordinated rational actors will systematically underproduce the good in question. Because no one producer will be able to reap all of the social benefits generated by its investments in a public good, producers will systematically fail to invest as much as is warranted by the social benefits the good provides. Even worse, potential beneficiaries of a public good have affirmative incentives to hold off on investing in the good altogether in hopes of free riding off of the efforts of other providers.¹⁰³

At the level of the nation-state, national security has long been a classic example of a public good. National security is nonrivalrous and nonexclusive. Each citizen has an interest in seeing that others provide for a national security system on which she can rely without investing in it herself.¹⁰⁴ At the transnational level, the analysis for international security is much the same, except that no central body like the state exists to step in and coercively require contributions for the mutual benefit of the members. No one state stands to recoup the global benefits to be reaped from the costly establishment of international security. Moreover, each state would prefer (all things being equal) to be able to rely on security provided by the investments of others.¹⁰⁵

From the view afforded by the game theory model, the public goods problem purports to explain why the world needs the United States to act as a global hegemon to secure peace and security unilaterally.¹⁰⁶ U.S. hegemony promises to cut through the public goods problem by establishing a global actor whose power is so great that it recoups enough of a benefit to warrant investments in public goods such as global security. The public goods problem, after all, is a spe-

¹⁰² See Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 116 YALE L.J. (forthcoming 2007), available at <http://www.ssrn.com/abstract=894117>.

¹⁰³ See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 132–34 (1st ed. 1965).

¹⁰⁴ See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 23 (1991).

¹⁰⁵ See Charles P. Kindleberger, *International Public Goods Without International Government*, 76 AM. ECON. REV. 1, 7–11 (1986).

¹⁰⁶ See Yoo, *supra* note 12, at 784–87.

cies of collective action or coordination problem, and nothing resolves a coordination problem like unilateral action.

A number of additional observations about world politics seem to follow from the public goods theory. According to Yoo, for example, U.S. provision of global security explains the success of the European Union among states with historically antagonistic traditions.¹⁰⁷ (Historically antagonistic E.U. member states cooperate, Yoo explains, because their antagonisms are muted by an “American security guarantee.”¹⁰⁸) The promise of U.S. hegemony also explains why the latest round of proposed United Nations reforms to create a stronger Security Council is doomed to failure; a stronger (but inevitably still collective) Security Council will only hamper the capacity of regional and global powers to cut through collective action problems via unilateral action.¹⁰⁹

For theorists of the American imperial executive, the public goods theory of international security and the global rule of law further explain why American constitutional law — properly understood — authorizes an imperial executive branch, capable of implementing a unilateralist foreign policy through its ostensibly inherent and formally unchecked constitutional foreign affairs powers.¹¹⁰ Yoo suggests in his book that a strong Executive is most likely to advance the nation’s interests in the field of international relations. “[T]he presidency,” Yoo writes, “best meets the requirements for taking rational action on behalf of the nation in the modern world.”¹¹¹ More recently, Yoo and a coauthor have elaborated this theory at greater length. Their formal conclusion is that Yoo’s theory of the strong executive is the best allocation of power from the perspective of rational choice international relations theory.¹¹²

The difficulty with the public goods theory is that, stated in its baldest form, the formal model of public goods in international security is neither provable nor disprovable. Other nation-states, of course, may object to U.S. actions that purport to provide global public goods. Even in the short time since 9/11, such objections have become familiar, especially after the U.S. invasion of Iraq.¹¹³ But under the public goods theory, such objections are radically discounted, for objection is precisely what the public goods theory predicts. According to the the-

¹⁰⁷ See Delahunty & Yoo, *supra* note 28, at 328.

¹⁰⁸ *Id.*

¹⁰⁹ See Yoo, *supra* note 29, at 656–60; see also Yoo & Trachman, *supra* note 29 (critiquing U.N. rules on the use of force).

¹¹⁰ See Nzelibe & Yoo, *supra* note 102 (arguing that a war powers system that allocates broad powers to the Executive best advances the effectiveness of the warmaking system).

¹¹¹ YOO, *supra* note 20, at 20.

¹¹² See Nzelibe & Yoo, *supra* note 102.

¹¹³ See STEPHEN M. WALT, TAMING AMERICAN POWER 62–69 (2005).

ory, free-riding nation-states can be expected to feign objection so as to avoid future obligations to contribute to international security. Objection is in their interest because it minimizes their future exposure. As a result, not even the vociferous objection of other nation-states undercuts some versions of the public goods defense of U.S. hegemony. If ever there were a theory of international relations well-designed to support the self-justifying exercise of U.S. power around the world, this is it. As a formal model, the public goods theory is terrifyingly unfalsifiable.¹¹⁴

This is where history comes in, and it is why the historical analogy to the Pax Britannica has proven so important in the literature on the new moment of American empire. The challenge for the public goods theory is to specify when it applies and when it does not. Certain kinds of international projects, it turns out, are especially susceptible to collective action problems. Others are more amenable to effective coordination and resist unilateral solutions.¹¹⁵ The difference between the two kinds of projects often turns on institutional context, and for just this reason, debates in international relations have long sought to move beyond formal model-building by filling in the historical and institutional context of international relations.¹¹⁶

No one has more energetically pursued the historical virtues of the British Empire than the dauntingly prolific historian Niall Ferguson. Whereas most of the new advocates of the British imperial model offer only a stylized version of empire, Ferguson's voluminous histories describe the empire in detail. Ferguson does not shy away from empire's

¹¹⁴ There is at least one piece of evidence that ought to give advocates of the public goods thesis some pause. Yoo tells us that the United Nations threatens to obstruct the benign hegemonic unilateralism of the United States. See Yoo, *supra* note 29; Yoo & Trachman, *supra* note 29, at 379–86. If the world community were made up of free-riders coasting on the efforts of the United States, the last thing we would expect them to do is to object in a forum and in a manner that might actually work. Individual nation-state objections may be cheap talk, but collective objection in the United Nations might actually carry some weight and discourage the United States from providing precisely the public good on which U.N. member states free-ride. Even if the free-riding states might be expected to engage in cheap-talk protest, they should not be expected to obstruct the provision of the public good on which they purportedly rely.

¹¹⁵ See GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY (Inge Kaul, Isabelle Grunberg & Marc A. Stern eds., 1999) (discussing various global collective action problems); TODD SANDLER, GLOBAL COLLECTIVE ACTION (2004) (describing the variety of international public goods problems). Even critics of international law view coordination questions this way. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 33–37, 83–88 (2005).

¹¹⁶ See, e.g., G. JOHN IKENBERRY, AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS (2001); ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (rev. ed. 2005); ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999); see also Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404 (2006) (book review).

ugly features. He describes them in considerable detail, ranging from the British scramble for Africa, in which resistance was simply “mown down by the Maxim gun,”¹¹⁷ to the Boer concentration camps, to the killing of some 10,000 Muslim enemies of the empire in a single battle at the turn of the twentieth century, to the 1919 massacre of peaceful protesters at the Jallianwala Bagh in what is now Indian Punjab.¹¹⁸ With these events close to mind, Ferguson is at pains to develop an unvarnished argument for the British Empire, one that rests not merely on empire’s virtues but also on the vice of its alternatives.

For much of its history, Ferguson writes, “the British Empire acted as an agency for imposing free markets, the rule of law, investor protection and relatively incorrupt government on roughly a quarter of the world.”¹¹⁹ He is aware, of course, how contrary to the conventional scholarly wisdom this kind of claim about empire has become, and so it is with something approaching contrarian glee that Ferguson declares that “no organization in history has done more to promote the free movement of goods, capital and labour than the British Empire in the nineteenth and early twentieth centuries. And no organization has done more to impose Western norms of law, order and governance around the world.”¹²⁰

Ferguson’s reasoning rests on a counterfactual. His claim is not that the British Empire was an unalloyed boon to mankind. Ferguson’s argument is that the alternatives were far worse. Because the British brought with them the common law, the idea of liberty, the institutions of democracy and the ideology of freedom, the British Empire came with its own built-in set of constraints — constraints that could be (and often were) invoked by the colonized as well as the colonizers.¹²¹ “The question,” Ferguson writes, “is not whether British imperialism was without blemish. It was not. The question is whether

¹¹⁷ FERGUSON, *supra* note 22, at 240.

¹¹⁸ *See id.* at 223–40, 264–70, 276–82, 326–28.

¹¹⁹ *Id.* at xxiii.

¹²⁰ *Id.* at xxiv.

¹²¹ *Id.* at xxv. For an excellent view of the ways in which the Empire dispersed common law principles around the world, see MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562–1955 (Douglas Hay & Paul Craven eds., 2004), which describes the expansion of employment law throughout the British Empire. Other studies proffer the controversial contention that the spread of the common law through the British Empire promoted economic development more effectively than did the civil law spread by the British Empire’s European competitors. *See* Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998) (arguing that common law countries have stronger legal protections for investors than do those using other legal systems); *see also* Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q.J. ECON. 1193 (2002) (observing differences between common law and civil law systems and arguing that these differences are associated with different social and economic outcomes).

there could have been a less bloody path to modernity."¹²² Ferguson's intuition is that there could not. It is a striking and plausible idea.

The power of Ferguson's case is readily apparent even as the objection to it is clear. Its power is that it refuses to romanticize the non-Western alternatives to British power. Ferguson takes very seriously the idea that the kinds of order and stability that liberal Western states have achieved are often critical for human flourishing. To be sure, the appeal of this idea speaks volumes about the chastened aspirations of our Hobbesian times. Nonetheless, given the success of Western values over the past century, Ferguson's argument warrants deep respect.

The objection to Ferguson's counterfactual assessment is that by starting the inquiry with a Western modernity to which the British Empire helped give shape, Ferguson has loaded the dice. How else better to arrive at the present than via the route that was in fact taken by the past? Left out of the equation in this kind of backward-looking story are the ways in which present arrangements undoubtedly condition and constrain our conceptions of what is possible in the world. The reverse teleology of Ferguson's method omits the ways in which present arrangements inevitably shape our conceptions of the good.¹²³ Ferguson's counterfactual defense of empire ultimately reduces to a referendum on the social order of Western-dominated modernity. Those who admire Western capitalism will find much to credit in the British Empire. Modernity's critics will find much to fault.

Either way, for critics and defenders alike, the important point here is that Ferguson's version of the legend of the imperial peace does not do the work that Yoo needs it to do. There is little doubt (even if Ferguson's comparison of the British Empire with its non-Western competitors is right) that the British Empire could have been better than it was, that its liberty- and rule-of-law-disseminating features could have been elevated more highly over its brutal and ravenous ones than they were. Few of the Empire's guns at Omdurman, or its camps in the Transvaal, or its troops in the Punjab could reasonably have been seen as critical to the bringing of liberal values to the undeveloped world. The British Empire, to be sure, might have been preferable to alternatives such as the Japanese empire that Ferguson glimpses along the River Kwai in Japanese-controlled Thailand during World War II. The British Empire might better have embodied liberal principles than the Mughal Empire that the Indian Mutiny of 1857 sought to restore.¹²⁴ But was the actual British Empire better than a counterfactual

¹²² FERGUSON, *supra* note 22, at xxix.

¹²³ It is worth noting that Ferguson surely understands this point: he is the editor of a highly sophisticated set of essays on counterfactual histories. See *VIRTUAL HISTORY* (Niall Ferguson ed., 1999).

¹²⁴ FERGUSON, *supra* note 22, at xxvi.

tually better form of the British Empire might have been? This, after all, is the question many critics raise with respect to U.S. power today. Their claim is not typically that the United States is better or worse than other powerful actors around the world, but that there might be a better version of the United States. The question they pose is which of several forms of American power the government ought to project around the world.

From this perspective, Yoo's version of a constitution for the Pax Americana hardly seems like a propitious way to reinvigorate the project of liberal empire. Yoo's account of executive authority would minimize the place of courts and legal processes. In Ferguson's account, however, the spread of common law institutions to the far corners of the globe appears as one of the British Empire's central virtues. The logic of Ferguson's defense of the Empire might therefore lead one to reject precisely the kinds of executive prerogative that Yoo defends.

III. MORANT BAY AND THE LEGEND OF THE IMPERIAL PEACE

A Jurisprudence of Power, by R.W. Kostal, a legal historian at the University of Western Ontario, is a brilliantly timed monograph on the well-known controversy surrounding British colonial governor Edward John Eyre and martial law in Jamaica, a cause célèbre of mid-nineteenth-century British imperial politics. The book is apparently unaffected by the fantasies and fictions of empire concocted by so many in our own era. It provides a wonderful way into the actual operation of the law of empire and that law's troubled place in Anglo-American constitutionalism. Moreover, Kostal's story helps to make sense of critical features of twenty-first-century American legal debates, especially arguments for an imperial executive.

The public goods analysis and Ferguson's counterfactual thesis leave us in something of a quandary. They offer theories sustained by little more than a few stylized facts and a history told at a vertiginously high level of abstraction. They do little to delve into the nitty-gritty day-to-day operation of empire, nor do they tell us much about the role that law and constitutionalism played in the British parallel to American power. What both views could use is thicker description of empire in practice. Kostal's book does this beautifully. It deserves a large audience.

A. *Morant Bay*

On October 11, 1865, a large group of black Jamaicans mobbed the courthouse in Morant Bay, Jamaica, in the island colony's southeast

corner. Tensions had been building for some time. In 1833, Britain had enacted a gradual plan to abolish slavery in Jamaica,¹²⁵ and by the end of the 1830s, that plan had come to fruition. Over the next few decades, poor Jamaicans suffered from what one historian has described as “an almost biblical onslaught of plagues: cholera, smallpox, drought and floods.”¹²⁶ Food prices increased sharply because of the reduced supply and increased demand touched off by civil war in the United States.¹²⁷ Making matters worse, the colonial government had begun a concerted campaign to clear squatters from land that planters sought to turn to sugar production.¹²⁸ By the time Jamaicans gathered to assault the courthouse at Morant Bay, conditions in Jamaica had led many white British colonial officials to conclude that black Jamaicans were incapable of developing the thrift and industriousness required in a post-slavery market economy. The three-decades-old experiment in emancipation seemed to many in the white planter elite to have been a failure.¹²⁹

In the notoriously difficult conditions of post-emancipation Jamaica, the Morant Bay courthouse became a sore spot in relations between the white planter class and black Jamaicans. As historian Thomas Holt puts it, “more often than not, planters were the complainants and judges, while blacks were the defendants and losers.”¹³⁰ At the petty sessions of the justices of the peace, overseen by the local white magistrate, the scales of justice too often seemed to be tipped in favor of the planters. The planters selected the magistrates, and local blacks came to resent the power that the magistrate’s court gave to local planters in the construction of the new, post-slavery economy. In particular, Jamaicans increasingly chafed at the seemingly one-sided decisions by magistrates in land cases pitting squatters or Jamaicans claiming customary or prescriptive rights in land against white colonial sugar planters.¹³¹ A royal commission subsequently named to investigate the events of October 1865 at Morant Bay concluded that the

¹²⁵ See THOMAS C. HOLT, *THE PROBLEM OF FREEDOM: RACE, LABOR, AND POLITICS IN JAMAICA AND BRITAIN, 1832-1938*, at 48-53 (1992).

¹²⁶ *Id.* at 263.

¹²⁷ *See id.* at 264-65.

¹²⁸ *See id.* at 265.

¹²⁹ *See id.* at 278-80; ERIC FONER, *NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY* 27, 29-30, 42 (1983); KOSTAL, *supra* note 23, at 4-5.

¹³⁰ HOLT, *supra* note 125, at 288.

¹³¹ *See* KOSTAL, *supra* note 23, at 95-97; DIANA PATON, *NO BOND BUT THE LAW: PUNISHMENT, RACE, AND GENDER IN JAMAICAN STATE FORMATION, 1780-1870*, at 159-61 (2004).

desire to obtain land and lack of confidence in the courts were two of the most significant causes of the uprising.¹³²

In Morant Bay, a local preacher named Paul Bogle crystallized the bitterness against the local magistrate. Bogle inveighed against the magistrate and against the legal regime that turned Jamaicans off of what many of them had come to think of as their land.¹³³ Tensions boiled over in September and October 1865. Breaches of the peace at eviction proceedings¹³⁴ led the magistrate, Baron Maximillian von Ketelhodt (a German-born Jamaican planter whose life would surely have made an extraordinary story if it had not turned out to be so short), to issue arrest warrants for Bogle and several others. Bogle and the others forcibly resisted the arrests.¹³⁵ In response, von Ketelhodt mustered the local militia and on October 11 convened a meeting of the area's white and colored elite in the Morant Bay courthouse. That same day, Bogle and more than 500 followers marched on the town square, sacked the local police building, and when confronted by von Ketelhodt and the militia, refused to disperse.¹³⁶ Shots were exchanged, and when von Ketelhodt and his men retreated to the courthouse, Bogle's rag-tag group set the courthouse on fire. Of those who fled the burning courthouse, eighteen were pursued, caught, and killed (including von Ketelhodt).¹³⁷ By the time the insurrection slowed, Bogle's followers had killed a total of seven militiamen and twenty-two civilians, and had injured some thirty-four others.¹³⁸ In the days that followed, roving groups of armed Jamaicans plundered estates all around the Morant Bay area and killed at least two more white planters.¹³⁹

Recriminations by the British colonial government were fierce. Just eight years earlier, in 1857, the Sepoy Mutiny in India had put British colonial officials on high alert for insurrection in the empire.¹⁴⁰ Governor Edward Eyre — who would later cite the Indian mutiny in his defense¹⁴¹ — had only 500 white troops at his disposal and faced a

¹³² See Arvel B. Erickson, *Edward T. Cardwell: Peelite*, 49 *TRANSACTIONS AM. PHIL. SOC'Y* 1, 51 (1959); see also KOSTAL, *supra* note 23, at 96–97; PATON, *supra* note 131, at 159–61.

¹³³ See KOSTAL, *supra* note 23, at 12.

¹³⁴ For a more detailed account of the legal proceedings that touched off the uprising, see HOLT, *supra* note 125, at 294–97.

¹³⁵ See *id.* at 295–96; KOSTAL, *supra* note 23, at 12.

¹³⁶ See KOSTAL, *supra* note 23, at 12.

¹³⁷ See *id.* at 12–13.

¹³⁸ See HOLT, *supra* note 125, at 299.

¹³⁹ See *id.* at 298–99; KOSTAL, *supra* note 23, at 13.

¹⁴⁰ See KOSTAL, *supra* note 23, at 205–08.

¹⁴¹ See *id.* at 35.

population of some 400,000 black Jamaicans.¹⁴² Eyre aimed to make up in force and terror what he lacked in numbers.

On October 13, Eyre declared martial law in Surrey County, which included Morant Bay. Over the next seven days his armed troops brutally restored order in Morant Bay and its environs. In the following weeks, even after order had been restored, Eyre and his military subjected the black residents of Morant Bay to what Kostal calls "a protracted and calculated reign of terror."¹⁴³ Between 439 and 483 Jamaicans were shot or executed (Bogle was among those executed).¹⁴⁴ More than 600 were the victims of what the Jamaica Royal Commission later called "positively barbarous" floggings.¹⁴⁵ The British colonial forces burned more than 1000 homes and left some 4000 people homeless.¹⁴⁶ At least one suspected rebel rumored to be an obeahman (or witch doctor) was beheaded.¹⁴⁷

Governor Eyre also ordered the arrest of a colored opposition politician named George Gordon on charges of inciting the rebellion. Gordon was a well-known figure who frequently communicated with a number of British liberals in London. In what would later become one of the most controversial responses to the insurrection, Eyre had Gordon transported into the jurisdiction in which he had declared martial law. A military commission tried and hanged Gordon six days after he had surrendered to authorities.¹⁴⁸

Soldiers and militiamen took the atmosphere of violent recrimination considerably further than even Eyre seems to have intended. A provost-marshal named Duberry Ramsay was probably the most vicious. Ramsay was named the head of a prison camp during the martial law period, and in this capacity he sadistically whipped scores of prisoners and executed dozens summarily on the barest and flimsiest of evidence.¹⁴⁹ Ramsay made possible the successful prosecution of Gordon by inducing prisoners in his camp to testify against Gordon in the military commission at which Gordon was tried.¹⁵⁰

¹⁴² See *id.* at 13; 1871 Jamaica Census, *microformed on* International Population Census Publications (Population Research Ctr., Univ. of Tex. at Austin).

¹⁴³ KOSTAL, *supra* note 23, at 13.

¹⁴⁴ See *id.*; Erickson, *supra* note 132, at 51.

¹⁴⁵ Erickson, *supra* note 132, at 51 (orthography in original); see also KOSTAL, *supra* note 23, at 13.

¹⁴⁶ Erickson, *supra* note 132, at 51.

¹⁴⁷ HOLT, *supra* note 125, at 302.

¹⁴⁸ See *id.* at 302-05; KOSTAL, *supra* note 23, at 13-14.

¹⁴⁹ See KOSTAL, *supra* note 23, at 93-94.

¹⁵⁰ *Id.* at 94-95 & n.176.

B. Morant Bay and the Legal Frame

Simply by retelling the story of Morant Bay, Kostal has successfully undermined the most confident and stylized versions of the hegemonic imperial peace thesis. The Morant Bay episode (like most such episodes) seems to have been forgotten by apostles of the imperial peace. But its details have been well known to students of the British Empire since soon after the events took place. Morant Bay stands alongside a litany of brutal episodes in the long moment of Britain's imperial power: the execution of hundreds and the killing of hundreds more in the suppression of the Christmas Rebellion in Jamaica in 1831;¹⁵¹ the horrific retribution at Cawnpore and Peshawar after the Indian Mutiny of 1857;¹⁵² Cecil Rhodes's unveiling of the Maxim gun in 1893 in what would later become Rhodesia;¹⁵³ the massacre of the Mahdi army in the Sudan in 1898;¹⁵⁴ the concentration camps in South Africa in which almost 30,000 Boers died at the turn of the twentieth century;¹⁵⁵ and the massacre of passive resisters in Amritsar in 1919.¹⁵⁶ On closer examination, even the ostensible triumphs of the liberal British Empire appear tarnished. Antislavery advocacy subtly legitimated labor exploitation in English industry; the struggle against piracy often swept broadly, categorizing as "pirates" many who were simply opposed to the Empire.¹⁵⁷ The imperial peace thesis, it turns out, is uncomfortably close to the self-interested view avowed by the Maxim gun-toting Rhodes himself, who famously announced: "We are the first race in the world, and the more of the world we inhabit, the better it is for the human race."¹⁵⁸

Perhaps the most useful feature of the Morant Bay crisis is that it puts in perspective the extent to which liberal empire achieved its ostensibly liberal ends. Even in the second half of the nineteenth century and the beginning of the twentieth, at the height of what Ferguson touts as Britain's period of liberal empire, the colonial project was as much about violent suppression as it was about the spread of law

¹⁵¹ See Mary Reckord, *The Jamaica Slave Rebellion of 1831*, 40 PAST & PRESENT 108 (1968).

¹⁵² See FERGUSON, *supra* note 22, at 151-52.

¹⁵³ See *id.* at 225-26.

¹⁵⁴ See *id.* at 267-68.

¹⁵⁵ See *id.* at 277.

¹⁵⁶ See *id.* at 326.

¹⁵⁷ On the relationship between the antislavery movement and labor exploitation in industrial Britain, see DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823* (1975). On the politics of piracy, see generally MARCUS REDIKER, *BETWEEN THE DEVIL AND THE DEEP BLUE SEA: MERCHANT SEAMEN, PIRATES, AND THE ANGLO-AMERICAN MARITIME WORLD, 1700-1750* (1987); NICHOLAS TARLING, *PIRACY AND POLITICS IN THE MALAY WORLD* (1963); and CARL A. TROCKI, *PRINCE OF PIRATES* (1979).

¹⁵⁸ See FERGUSON, *supra* note 22, at 228.

and Western-style liberalism. Indeed, in the conventional account of the British imperial experience (an account that Kostal's book confirms), Morant Bay and its aftermath helped to undo the liberal experiment in emancipation and self-government in the colonies, replacing a short-lived empire of free labor with one based squarely on the racial subordination of non-white colonies to the white European empire. It was a short step from Morant Bay to Conrad's *Heart of Darkness*, to Kipling's white man's burden, and to the long list of abuses in the race-based empire of the late nineteenth and early twentieth centuries.¹⁵⁹

Kostal's book is far more, however, than merely a recitation of the terror and brutality that accompanied empire. What Kostal has done is trace the constitutional culture that Hulsebosch describes in the British Empire of the eighteenth century into the second British Empire a century later. Over the weeks and months that followed the suppression of the rebellion, debate swelled in Britain over the propriety of Eyre's actions and those of the soldiers under his command. Within weeks of the first reports of insurrection, public opinion in England began to turn against Governor Eyre.¹⁶⁰ The leading lights of mid-nineteenth century Britain began to line up for or against Eyre. John Bright, John Stuart Mill, T.H. Huxley, and Charles Darwin counted themselves among Eyre's fiercest critics. Thomas Carlyle, John Ruskin, and the scientist John Tyndall were among his strongest supporters.¹⁶¹ Kostal's book is an account of the debates that ensued.

The Jamaica debate might plausibly have taken place in any number of discursive dimensions. The controversy might have touched off a moral or ethical debate. It might have set off a debate carried on in the terms of religious or humanitarian obligation. (The antislavery debate in England had largely been carried on in these terms just a few decades earlier.¹⁶²) It might have been a debate about the fate of the Empire and the possibility of what twenty-first-century Americans anxiously describe as "imperial overstretch."¹⁶³ The controversy in Britain about Morant Bay might have led to a debate about race, and in significant part it did precisely that. It might have produced a political debate about Lord John Russell's Liberal government as well, and here again, in significant part, it did. Colonial Secretary Edward

¹⁵⁹ See HOLT, *supra* note 125, at 307–08; PORTER, *supra* note 2, at 53–54; Thomas C. Holt, *The Essence of the Contract*, in FREDERICK COOPER, THOMAS C. HOLT, & REBECCA J. SCOTT, *BEYOND SLAVERY: EXPLORATIONS OF RACE, LABOR, AND CITIZENSHIP IN POSTEMANCIPATION SOCIETIES* 33 (2000).

¹⁶⁰ See KOSTAL, *supra* note 23, at 14–15.

¹⁶¹ See *id.* at 15, 154–55, 187–89.

¹⁶² See DAVIS, *supra* note 157; Thomas Haskell, *Capitalism and the Origins of the Humanitarian Sensibility* (pts. 1 & 2), 90 AM. HIST. REV. 339, 547 (1985).

¹⁶³ The term was coined in the 1980s by Paul Kennedy. See KENNEDY, *supra* note 11, at 515.

Cardwell quickly suspended Eyre as governor and appointed his replacement to head a royal commission to investigate the episode.

Kostal's central observation is that law talk — the discourse of legality and constitutions — saturated the Morant Bay controversy. The Jamaica debate became first and foremost a legal and constitutional debate. Not one speaker in all of the controversy, Kostal observes, seems to have condemned Eyre for having sinned. (Sin had been the slaveholders' error just a few decades before, and many of Eyre's fiercest critics were Christian missionaries and former abolitionists.¹⁶⁴) The problem in the view of Eyre's critics was not that Eyre and his officers had committed sins, but that they had committed crimes. In turn, Eyre's supporters defended his actions in similarly legal terms: they insisted he had followed the law.¹⁶⁵ As Kostal puts it, the central players in the Jamaica controversy talked and acted according to a set of "deeply ingrained habits of mind"; virtually all of them "saw the world through the prism of law."¹⁶⁶

In December 1865, liberals such as Bright and Mill established an ad hoc group known as the Jamaica Committee, whose central goal was to establish that the protections of the British constitution and of British law extended even to the most distant parts of the Empire. Their mission, as Kostal writes, was to establish that "civilian and military agents of the Crown were always and everywhere legally accountable for their official acts, even when those acts took place under a proclamation of 'martial law.'"¹⁶⁷ (Mill, in particular, seems to have been committed to the idea of pursuing a legal judgment on the Eyre controversy in the courts.) Accordingly, the Jamaica Committee retained two distinguished barristers, one a Queen's Counsel, to draft an opinion on the illegality of Eyre's conduct. With the opinion in hand, the Committee pushed the government to initiate a criminal prosecution of Eyre.¹⁶⁸ When the new Conservative government declined to do so (and when Disraeli went so far as to suggest that Eyre had acted appropriately under the circumstances), the Committee began two private criminal prosecutions of Eyre and a third against two military officers who had sentenced George Gordon to death: Colonel Abercrombie Nelson and Lieutenant Herbert Brand.¹⁶⁹ For good measure, the Committee sponsored a private civil suit against Eyre by two Jamai-

¹⁶⁴ DAVIS, *supra* note 157; KOSTAL, *supra* note 23, at 134.

¹⁶⁵ KOSTAL, *supra* note 23, at 45.

¹⁶⁶ *Id.* at 128.

¹⁶⁷ *Id.* at 15.

¹⁶⁸ *See id.* at 49–52.

¹⁶⁹ *See id.* at 15–16.

cans seeking damages for injuries they had suffered during the period of martial law.¹⁷⁰

Kostal plausibly contends that “the Jamaica Committee succeeded in provoking the most protracted and significant public discussion of the idea of the rule of law during the Victorian era.”¹⁷¹ In turn, the affair revealed “the deep penetration into public discourse of legal terms, criteria, and concepts.”¹⁷² Law and constitutionality became the measures of propriety in the British Empire, and in the process law and legality became the language in which the Jamaica controversy played itself out. Eyre’s critics described his errors not in terms of their immorality (though they agreed Eyre’s acts were immoral), but in terms of their illegality and inconsistency with the British constitution. Their aim was to force the government to “uphold constitutional law”¹⁷³ in the Empire and to “vindicate the majesty of British law.”¹⁷⁴

As Kostal tells the story, lawyers and law seem to have been everywhere. A battery of British barristers descended on Jamaica in January 1866 to investigate the uprising and its aftermath.¹⁷⁵ Eyre’s Colonial Office replacement, Henry Storks, identified the failure “to abide by the laws” as the chief source of the troubles at Morant Bay.¹⁷⁶ (Storks initiated local Jamaican-court prosecutions against participants in the uprising and against white officials accused of excesses during the period of martial law.¹⁷⁷) Publications proliferated in the legal press regarding the legal questions arising out of the episode. One legal writer, W.F. Finlason, alone produced no fewer than five treatises on martial law in the years immediately following Morant Bay, and partisans on all sides produced a mountain of pamphlets on the significance of martial law in British constitutionalism.¹⁷⁸ Lord Chief Justice Alexander Cockburn and Sir Colin Blackburn — perhaps the two leading judges in Britain — issued widely reprinted grand jury instructions in cases arising out of the controversy: Cockburn in the prosecution of Nelson and Brand, and Blackburn in the prosecution of Eyre himself. Newspapers and the popular press carried on extended

¹⁷⁰ See *id.* at 432–33.

¹⁷¹ *Id.* at 16.

¹⁷² *Id.* at 18.

¹⁷³ *Id.* at 36 (quoting DAILY NEWS (LONDON), Dec. 2, 1865, at 2) (internal quotation marks omitted).

¹⁷⁴ *Id.* at 37 (quoting DAILY NEWS (LONDON), Dec. 6, 1865, at 2) (internal quotation marks omitted).

¹⁷⁵ *Id.* at 73–78.

¹⁷⁶ *Id.* at 71 (quoting TIMES (LONDON), Aug. 29, 1866, at 6) (internal quotation mark omitted).

¹⁷⁷ *Id.* at 70. Tellingly, the former prosecutions were successful, but the latter were not. Military prosecutions of British officials in courts martial also failed. *Id.* at 119.

¹⁷⁸ *Id.* at 194–95, 209–28, 256.

debates on the constitutional questions raised by Eyre's conduct, all the while reporting avidly on each new development in the Jamaica Committee's legal proceedings.

The deep penetration of law talk into the debates on the Morant Bay affair made law, in Kostal's words, the "forum for the negotiation of the basic terms of political power" in the Jamaica debate.¹⁷⁹ As Kostal puts it, "the country turned to lawyers and judges to accomplish what had not been accomplished by politicians: to reconcile the nation's conflicting passions for legality and imperial dominion."¹⁸⁰

It is worth considering the significance of this turn to law, not the least for the light it may shed on the turn to law in our own moment of empire. What did it matter that law — not religion, not politics, not ethics — became the conversational vehicle for discussions in Britain over the relationship between morality and imperial power? Kostal contends that the turn to legality produced an "English moral imagination" that was dominated by questions of law, a moral imagination that functioned as "a legal imagination."¹⁸¹ But what exactly is the meaning of such a turn to law and legality?

What Kostal seems to mean is that the legal frame offered a way of talking about the Jamaica problem that would bring the conversation-alists together on a field with a shared set of values and ground rules. Debates about the law helped to establish, in terms that Martha Minow has suggested,¹⁸² a shared way of speaking that linked speakers and their audiences to the past of the British constitution as well as to its future. It created "positions from which and audiences to which" those who sought to speak out on the Jamaica episode might address themselves.¹⁸³ The "medium" of the law, as Milner Ball has called it, might give shape to the claims of the contending parties in such a way as to confer significance on the positions of all sides; law might function as a "medium for responsible human intercourse,"¹⁸⁴ a medium that could "keep conversation, negotiation, argument, dialogue, and conflict going"¹⁸⁵ even in a community divided by sharp controversy. The great virtue of law, it seemed, was its capacity to constitute and reconstitute the British constitutional community even as it provided a mechanism for articulating differences within that community. Law, as James Boyd White has written of the modern American system, gives shape to the very relationships that define what is at contro-

¹⁷⁹ *Id.* at 464.

¹⁸⁰ *Id.* at 478.

¹⁸¹ *Id.* at 463.

¹⁸² See Martha Minow, *Interpreting Rights*, 96 YALE L.J. 1860, 1865 (1987).

¹⁸³ JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 266 (1984).

¹⁸⁴ MILNER S. BALL, LYING DOWN TOGETHER 33 (1985).

¹⁸⁵ *Id.* at 31.

versy.¹⁸⁶ The discourse of the law in Victorian Britain thus became both a way of talking about the controversy — a shared way of speaking — and a way of shaping it. In the Jamaica episode, the recourse to law helped to define both the contours of the controversy and the community in which the controversy arose.

Law talk may produce and reproduce community. But the consequences of law talk are more extensive still. Legal discourse produces a particular form of community. The choice to engage in law talk is the choice to engage in a kind of discourse with its own internal morality — a morality that rests on reason and that entails the dignity of the individuals who make claims on it.¹⁸⁷

The internal morality of legal and constitutional debate over empire helps to explain the significance of that debate from at least Hulsebosch's eighteenth century to the present day. Ferguson, too, would recognize the cardinal virtues of the liberal British Empire in the legal debate over the Jamaica uprising and its suppression. For Kostal, Hulsebosch, and Ferguson alike, the importance of law talk serves as a kind of testament to the significance of law and of rule-of-law values in the Empire, even in some of its most fraught situations. It is the authority of law talk that Yoo's book and the arguments for unfettered executive power have called into question in our own time.

IV. THE ANGLO-AMERICAN IMPERIAL CONSTITUTION

As in Kostal's Victorian crisis and Hulsebosch's eighteenth-century imperial constitution before it, questions of law and constitutionalism saturate debates over the current American imperial moment. Controversies over the use of force in places like Afghanistan and Iraq, over the detention facility in Guantánamo Bay, and over the rendition of terrorism suspects to foreign states where torture is used have been carried on in the language of the law and have given privileged space to courts and lawyers. The legal frame that Kostal and Hulsebosch describe in the English empire is still our frame a century and a half after Morant Bay.¹⁸⁸

The similarities between debates over empire in mid-nineteenth-century England, on one hand, and over the global power of the United States in the early twenty-first century, on the other, are quite striking. Both use legal framework and a distinctively legal language,

¹⁸⁶ See WHITE, *supra* note 183, at 273.

¹⁸⁷ See *id.*; Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Frank Michelman, *Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 43 (1986).

¹⁸⁸ See Benjamin Wittes, *Judicial Baby-Splitting and the Failure of the Political Branches, in TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES* 101 (Peter Berkowitz ed., 2005).

with all that the legal frame entails. Victorian jurists engaged in the same mix of arguments from constitutional principle and national strategy. Nineteenth-century advocates of an imperial executive — like their counterparts today — contended that constitutional doctrine favored precisely the strong Crown powers that Britain needed in its moment of imperial peril. Those who counseled restraint insisted that constitutional law required the very limits on martial law that would best advance Britain's international reputation and interests.¹⁸⁹

Indeed, the two debates even share many of the same terms and categories. Among the most striking features of Kostal's account for the twenty-first-century American reader is the readily recognizable taxonomy of nineteenth-century British legal and constitutional debate. In critical respects, British constitutional debate of more than a century ago foreshadowed the contours of debates that have surfaced in the United States since 9/11.

Just as in current debates, the relationships among the executive, legislative, and judicial branches played a central role in Victorian debates over empire. In the legal profession and in the popular press alike, the relationship between Parliament and the Crown in particular became a central focus of discussion, especially insofar as it related to power in the colonies.¹⁹⁰ The Jamaica Committee insisted that judicial oversight of executive power was a critical feature of the British constitutional tradition and that Disraeli and the Conservative government of Lord Derby had advanced a dangerous new theory of "Executive Government."¹⁹¹ For their part, Eyre and a cadre of conservative jurists insisted that the executive branch retained an inherent emergency authority that was virtually unreviewable by the courts. All sides weighed in on the relationship between Parliament's power and the executive authority of the Crown in the colonies.

Debate in Victorian constitutionalism also swirled around the moments of exception in the legal regime. Like observers of twenty-first-century American law,¹⁹² many in 1860s Britain contended that British

¹⁸⁹ See KOSTAL, *supra* note 23, at 253 (noting Harrison's strategic reason to extend equal rights to colonized peoples lest they rise up with the ferocity of the savages they are); see also *id.* at 468 (discussing damage to the international prestige of Great Britain as a nation that upholds the rule of law); *id.* at 334–35 (reporting Cockburn's description of the advocates of Crown power "in its most summary and terrible form" and their view that it is "indispensable" in the modern statecraft of empire).

¹⁹⁰ See, e.g., *One of Those Curious Questions Which Carry Us Far*, TIMES (LONDON), June 6, 1867, at 10–11.

¹⁹¹ KOSTAL, *supra* note 23, at 176.

¹⁹² See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); see also Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, in THE CONSTITUTION IN WARTIME, *supra* note 17, at 55; Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in THE CONSTITUTION IN WARTIME, *supra* note 17, at 39–54.

law ought to possess emergency suspension mechanisms that would create periods of exceptional, extralegal authority. The Jamaica Committee and its barristers, as well as jurists such as Lord Chief Justice Cockburn, countered that there were no emergency exceptions in British constitutionalism. (Their argument anticipated A.V. Dicey's thirty years later.¹⁹³) In this latter view, as in the view of many American jurists today, the British constitution and the common law system incorporated flexible response mechanisms internal to the law. Emergencies invoked these internal devices rather than triggering suspensions of the general constitutional and common law regime.¹⁹⁴

As in our own time, the parties involved in Victorian constitutional debate also took up sides on questions about what Edmund Burke almost a century before had called "geographic morality."¹⁹⁵ The Bush Administration has held prisoners at the well-known detention center in Guantánamo Bay and at shadowy prison centers in Eastern Europe, Djibouti, Afghanistan, and perhaps elsewhere.¹⁹⁶ It has done so in an effort to take advantage of what, echoing Burke, we might call a kind of geographic legality. Distance from the mainland United States was designed to allow the Executive to evade what it thought (on the advice of Yoo and his colleagues) might be higher levels of judicial scrutiny in cases involving prisoners held in the United States. Nineteenth-century British jurists, too, sought to invoke the distance between Britain and the colonies as grounds for limiting the reach of the British common law and constitutional traditions. They defended what Kostal describes as "a limited imperial exception to the principle of universal legal accountability"¹⁹⁷ under the common law. In Great Britain itself, jurists argued, martial law might be unavailable to the Crown, but in the far-flung reaches of the empire it was indispensable.¹⁹⁸

The notion of geographic legality responded directly to the fear expressed by many in England in the 1860s that martial law in the colonies would act as an entering wedge for martial law in England itself. For many, martial law in England seemed no small risk in the 1860s. Just as American civil liberties groups have warned that broad executive powers in foreign affairs risk seeping homeward, so too did the British government's actions in Jamaica seem to be echoed in episodes

¹⁹³ See DICEY, *supra* note 16, at 287–94.

¹⁹⁴ See *id.*

¹⁹⁵ See DIRKS, *supra* note 2, at 196.

¹⁹⁶ AMNESTY INT'L, *BELOW THE RADAR: SECRET FLIGHTS TO TORTURE AND "DISAPPEARANCE"* (2006), available at <http://web.amnesty.org/library/index/engamr510512006>.

¹⁹⁷ KOSTAL, *supra* note 23, at 256.

¹⁹⁸ The parallel move in American constitutional law is found in the *Insular Cases*. See Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005).

such as the arrests of suffrage protesters in Hyde Park in June 1866, as well as in the distinct possibility of martial law in Ireland in response to nationalist unrest.¹⁹⁹

Victorian debates over martial law at Morant Bay even featured a character to play the part of John Yoo. English barrister W.F. Finlason emerged soon after the Morant Bay uprising as a leading authority on martial law. In 1866 he published the first of what ultimately became five books on the topic, titled simply *A Treatise on Martial Law*.²⁰⁰ Finlason was Yoo's match in prolificness, though Yoo is considerably smoother as a writer and logician than Finlason ever was. (Finlason's strategy aimed not so much to persuade his readers as to beat them into submission by relentless prose in a never-ending flood of publications.) Finlason's work on the executive power in the British empire, like Yoo's, launched its author from relative obscurity into a storm of controversy.

Both men's ideas rest in significant part on a realist theory of international relations and a deep sense that power is the only language that counts in an anarchic world.²⁰¹ Finlason, like Yoo, was energized by what he saw as deep flaws in a conventional wisdom that seemed overly idealistic (Finlason ultimately came to call these flaws hypocrisies). Not surprisingly, Finlason's work, much like Yoo's, was roundly condemned by the author's political opponents.²⁰² Yet if Finlason's experience is any guide, Yoo's work may have a lasting impact on the law of foreign affairs. An opinion joined by four Justices of the U.S. Supreme Court cited Finlason as an authority on martial law just this past Term in *Hamdan v. Rumsfeld*.²⁰³

Kostal seems to disclose his view of twenty-first-century debates over the law of empire when he says that Finlason's work amounted to "a series of elaborate legal justifications for the ready and ruthless use of terror in the empire."²⁰⁴ Finlason became the most prominent defender of a broad power of martial law in the colonies and of the Crown's inherent authority to invoke it. He aimed to establish three propositions. The first was that the suppression of insurrection in the colonies was a form of warfare, and that this conferred on the Crown and its military all of the authority associated with wartime. Finlason argued, second, that the full war powers of the Crown were indispensable in the fight against the savages at the periphery of the empire. At the very beginnings of the much-touted period of Britain's liberal

¹⁹⁹ KOSTAL, *supra* note 23, at 162–63, 251.

²⁰⁰ W.F. FINLASON, *A TREATISE ON MARTIAL LAW* (London, Stevens & Sons 1866).

²⁰¹ See KOSTAL, *supra* note 23, at 481; YOO, *supra* note 20.

²⁰² See KOSTAL, *supra* note 23, at 244–45.

²⁰³ 126 S. Ct. 2749, 2783 (2006) (plurality opinion).

²⁰⁴ KOSTAL, *supra* note 23, at 229.

empire, Finlason announced that martial law would be needed with ever greater urgency to control the savage races that populated Britain's "widespread dominions."²⁰⁵ Finlason insisted that these two observations led inevitably to a third: Governor Eyre had supervened no legal limits in the Jamaica controversy. Eyre had merely executed the wartime authority of the Crown to put down a colonial insurrection. The empire, Finlason suggested, could not survive without extending this kind of authority to its officers.²⁰⁶

For all the parallels between Finlason's views and the strong executive position today, Finlason's propositions are at least as interesting for what they failed to include. There is at least one noticeable difference between the discourse of Anglo-American constitutional debate in 1865 and the language of the law today. The universe of possible legal moves has become larger; the law's boundaries have stretched to accommodate new and more polarized positions made available by the distinctive structure of U.S. constitutionalism. Unlike the British ministerial system, of course, the U.S. constitutional system creates an executive branch that is structurally independent of the legislative branch. Moreover, in the United States, courts have long claimed a power that by the nineteenth century was unavailable to their counterparts in the British system of parliamentary sovereignty: the power to review acts of Congress for constitutional violations. The result in the United States has been a radically more divergent constitutional discourse on important questions about law and global power.

Yoo and his colleagues have pushed out the rightward bounds of the debate over executive power in Anglo-American constitutional law. At no point during the Jamaica controversy of the 1860s did anyone suggest that Crown officials in the colonies (and certainly not Crown officials in the metropole) might not be legally bound by acts of Parliament. To be sure, Jamaica Committee partisans accused Disraeli and Lord Derby's Conservative government of secretly supporting a dangerous new theory of executive power.²⁰⁷ But nothing from the Derby government approached the claims made on behalf of the imperial executive in twenty-first-century American constitutionalism. This kind of unilateral executive authority was simply outside the horizons of a British constitutional debate that focused on the inherent powers of the executive branch only insofar as it was operating in what American specialists might now think of as Justice Jackson's second tier of executive authority: questions as to which the legislature had

²⁰⁵ *Id.* at 231 (quoting FINLASON, *supra* note 200, at v).

²⁰⁶ *See id.* at 231-32.

²⁰⁷ *See id.* at 176.

not yet acted.²⁰⁸ Virtually everyone agreed, for example, that Parliament had plenary authority over the governance and discipline of the British army.²⁰⁹

Even as the Right has moved the boundaries of American constitutional debate, the Left has done the same in the opposite direction, pushing out the left side of the constitutional universe. The Jamaica Committee, as Kostal notes, believed deeply in the importance of judicially announced standards for the thorny questions of the law of empire.²¹⁰ Committee members doggedly sought judicial determinations on the conduct of Eyre and his subordinates. They had what Kostal calls “an unflagging faith” in a court-centered theory of the British law of empire.²¹¹ But one searches in vain through the Jamaica Committee’s voluminous publications for the position adopted by American liberals that courts ought in the name of constitutional rights to strike down certain procedures authorized by the legislative branch. The British system of parliamentary sovereignty simply did not permit this move. Even the great liberal statement of the law of empire in Lord Chief Justice Cockburn’s grand jury charge conceded that Parliament could institute martial law anywhere in the Empire, even in the heart of England.²¹² Indeed, the Lord Chief Justice observed more than once that the problem of martial law in the colonies was “one that ought to receive legislative solution.”²¹³ As one critic of Eyre put it in January 1866, the proposition that liberals sought to vindicate was not that the British constitution prohibited military court jurisdiction over British subjects, but that military courts had no jurisdiction over British subjects “without an express Act of the Legislature.”²¹⁴

Along both of these dimensions — executive power for Yoo and judicial power for twenty-first-century American liberals — the bounds of the Anglo-American law of empire have grown further apart. (This is one of the reasons that torture, which around the time of the Morant

²⁰⁸ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–37 (1952) (Jackson, J., concurring).

²⁰⁹ See, e.g., CHARGE OF THE LORD CHIEF JUSTICE OF ENGLAND TO THE GRAND JURY AT THE CENTRAL CRIMINAL COURT IN THE CASE OF THE QUEEN AGAINST NELSON AND BRAND 67 (Frederick Cockburn ed., London, William Ridgway 1867) [hereinafter CHARGE OF THE LORD CHIEF JUSTICE].

²¹⁰ See KOSTAL, *supra* note 23, at 19.

²¹¹ *Id.*

²¹² See *id.* at 329.

²¹³ CHARGE OF THE LORD CHIEF JUSTICE, *supra* note 209, at 21.

²¹⁴ KOSTAL, *supra* note 23, at 211–12 (quoting SOLICITORS’ JOURNAL & REPORTER 198 (1866)) (internal quotation mark omitted). Finlason’s position was merely that “the constitution has vested in the Sovereign the right to resort to [martial law] without legislative sanction.” *Id.* at 244 (alteration in original) (quoting 41 L. TIMES 762–63 (1866)).

Bay controversy had been relegated to the realm of mere historical interest, has reentered the legal landscape.²¹⁵)

For all their differences, nineteenth-century British jurists shared among themselves a wide range of values and assumptions about British law in the Empire. More often than not they seem to have agreed with one another. Finlason on the Right and the Jamaica Committee on the Left both recognized that Parliament had the power to proclaim martial law and that the Crown had the authority to suspend the common law in the face of emergency. Moreover, virtually everyone in the debate shared the view that so long as Eyre and his officers had subjectively believed that their actions were a reasonable response to the circumstances, they had acted within the law, regardless of whether their beliefs had been objectively reasonable.²¹⁶ For all of its abstract rhetoric about the limits on the Crown and the importance of the common law in the colonies, Lord Chief Justice Cockburn's grand jury charge in the Nelson and Brand case boiled down to asking the grand jury whether Eyre and his officers had acted in the good faith belief that their actions were required to suppress the insurrection. Though it was often difficult to remember, Lord Chief Justice Cockburn, Justice Blackburn, and Finlason actually agreed on this point.²¹⁷

Even Finlason was committed to a version of the rule of law in empire that preserved judicial power to sanction unreasonable bad-faith responses by Crown officials to imperial exigencies. Courts, on Finlason's account, would hold the military to "those rules of common justice and humanity, which are universally obligatory, which are independent of all positive laws."²¹⁸ Finlason conceded that the common law extended throughout the Empire, but he insisted that it relaxed its standards as it approached the outer reaches of the imperial dominions and as it encompassed "alien races."²¹⁹ Opponents of Finlason such as Fitzjames Stephen and the Jamaica Committee agreed that the common law extended throughout the Empire; they merely embedded in the common law a public necessity doctrine for

²¹⁵ See generally Waldron, *supra* note 31, at 1683–84.

²¹⁶ See KOSTAL, *supra* note 23, at 338, 408.

²¹⁷ See *id.* at 352, 408.

²¹⁸ See *id.* at 482 (quoting FINLASON, *supra* note 200, at 84) (internal quotation marks omitted). Finlason's standard for military courts looks remarkably like the standard adopted several decades later by the U.S. Supreme Court in the *Insular Cases*, see, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1900), for determining those elements of the U.S. Constitution that applied in the territories acquired in the Spanish-American War. See Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 1, 8–9 (Christina Duffy Burnett & Burke Marshall eds., 2001). I am unable to locate any reference to Finlason's rule in the *Insular Cases* themselves or in the briefs.

²¹⁹ KOSTAL, *supra* note 23, at 481–82 (quoting W.F. FINLASON, *JUSTICE TO A COLONIAL GOVERNOR* 130 (London, Chapman & Hall 1869)) (internal quotation mark omitted).

times of emergency.²²⁰ Whether these positions in the end were different from one another in any concrete sense was as unclear then as it is now. What is clear is that whatever the legal differences, virtually everyone in the legal debates recognized some legal constraints in the Empire, but also sought to provide colonial officials the power necessary to maintain the Empire, even if it could only be preserved by vigorous force.²²¹

By comparison, the disagreements in twenty-first-century American constitutional debate are far sharper. Finlason's rule would have insulated British colonial officials from legal consequences for their actions under martial law only if they acted in good faith; on his account, courts retained jurisdiction to make those good faith determinations.²²² Yoo's approach to the executive power in foreign affairs, by contrast, practically eviscerates all of the legal constraints on executive actions. Allied positions of the 109th Congress and the Bush Administration purport to divest courts of the jurisdiction to review executive actions in the sphere of foreign affairs.²²³

The implications of this polarization are quite unsettling. Kostal suggests, as we have seen, that the legal frame in nineteenth-century Britain was not so much a set of substantive answers to the questions raised by empire as it was a forum in which debate about empire took place. The law functioned not as a body of rules or commands, but rather as a stock of discursive moves available to the contending parties in the debate over empire. Law created the linguistic field on which the differing sides debated the Empire. Yet for all their agreement, for all their shared premises, it was not always clear that the legal frame could give meaningful shape to their arguments. As the Jamaica episode wound down in 1868 and 1869, the law's ability to connect rather than disconnect, its power to enhance dialogue and keep conversations open, seemed to wane. Legal arguments began to spill over into political and ideological ones as lawyers and jurists accused one another of advancing ideological agendas rather than articulating legal rules.²²⁴ Notwithstanding widely shared premises and common doctrinal understandings, legal argument in the British Empire threatened to spin out of control.

If this is so, then what are we to make of the sharply more polarized frame of our own time? Few communities are more closely defined by their legal and constitutional schemes than the United States;

²²⁰ *Id.* at 480, 482.

²²¹ *See id.* at 482–84.

²²² *See id.* at 236–37 (describing Finlason's limits on executive authority under martial law).

²²³ *See, e.g.,* Military Commissions Act, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (2006) (Westlaw).

²²⁴ *See* KOSTAL, *supra* note 23, at 422–23, 430–31; *cf.* BALL, *supra* note 184, at 122.

indeed, American nationhood is largely a legal and constitutional creature.²²⁵ But our legal frame seems considerably less capable than its predecessor in Britain of establishing shared ground and shaping debates about the character of U.S. conduct in the world.

V. THE 9/11 CONSTITUTION AND THE CRISIS OF THE LEGAL FRAME

The imperial executive has been controversial at least in part because of the threat it seems to pose to the law's ability to serve as the medium for conversation about Anglo-American empire. Victorian empire sought to turn its biggest questions into legal and judicial ones. Elements in the current Administration — Vice President Cheney, his counsel David Addington, and John Yoo chief among them, apparently — have sought to cut courts and judges out of the picture, reserving for unilateral executive determination many of the very same questions that Victorian empire allocated to judges. Many in the American legal profession have sought to characterize this imperial executive position as outside the bounds of reasonable legal discourse. The American Bar Association and prominent local bar associations have taken uncharacteristically strong positions against the unilateral executive.²²⁶ Some have even described Yoo's memoranda for the White House as outside the bounds of professional competence.²²⁷

If positions as radical as Yoo's are available moves within the law of foreign affairs, the critics seem to reason, what kind of constraints can the legal frame be said to impose? The legal frame risks losing its power to impose a set of common boundaries and terms in the conversations about foreign affairs; it risks losing its remarkable capacity to reaffirm shared community values even as it arbitrates among our differences.

This is the polarized and fractured constitutional universe that the Supreme Court of the United States has encountered since 2004 in its post-9/11 terrorism cases. On one hand, the Administration has pushed the Court to adopt a constitutional scheme that looks much like the one that Yoo describes: a regime of broad executive powers,

²²⁵ See JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* (forthcoming 2007).

²²⁶ See Am. Bar Ass'n et al., Report to the House of Delegates (Aug. 9, 2004), reprinted in *THE TORTURE PAPERS*, *supra* note 46, at 1132.

²²⁷ See, e.g., Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 654–55 (2005); Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14. For a defense of Yoo as working within the professional mainstream, see Eric Posner & Adrian Vermeule, Op-Ed., *A 'Torture' Memo and Its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22; see also Sunstein, *supra* note 31, at 23–24 (describing Yoo's book as flawed but nonetheless lawyerly).

unobstructed by either congressional enactment or international law.²²⁸ This would be a regime located on the right edge of the universe of available constitutional moves in the American system — a space that did not exist in the regime in which *Kostal's* barristers and jurists joined issue over the Morant Bay controversy. On the other hand, the Administration's critics have urged the Court to articulate constitutional principles that would trump both the Executive and the Congress.²²⁹ If it were to do so, the Court would locate itself in yet another space unavailable to the jurists of Victorian empire.

So far, the Court has declined the invitations from both the Right and the Left. With respect to the former, the position of an ever-narrowing majority of the Court has been clear: the strongest claims of executive authority advanced by Yoo are wrong as a matter of constitutional law. In *Hamdi v. Rumsfeld*, the Court rejected the Administration's claim that courts have no authority to review executive branch detentions of U.S. citizens captured in combat zones; the Court even rejected the Administration's fallback position that courts could review only the question of whether there is "some evidence" to sustain the detention at issue.²³⁰ In *Rasul v. Bush*, the Court established a judicial beachhead for the review of executive detentions of aliens in Guantanamo Bay, and perhaps even around the world.²³¹ And in *Hamdan v. Rumsfeld*, the Court rejected the Executive's interpretation of the Detainee Treatment Act²³² as precluding judicial review of the claims of terrorism detainees at Guantanamo.²³³ The *Hamdan* Court declined to defer to ongoing proceedings in the Executive's military tribunals and ruled those military tribunals illegal.²³⁴

To the Bush Administration's critics on the Left, however, the Court has offered a thin gruel, largely declining invitations to issue sweeping rulings or to articulate bold new constitutional principles about individual rights and liberties. The *Hamdi* Court declined to

²²⁸ See, e.g., Brief for the Respondents at 41–46, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334, 03-343).

²²⁹ See, e.g., Brief for the American Bar Association as Amicus Curiae in Support of Petitioners at 5–12, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696).

²³⁰ See 124 S. Ct. 2633, 2644–45, 2648, 2651 (plurality opinion); see also *id.* at 2650 ("[I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge."); cf. *id.* at 2659 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (noting the "weakness of the Government's mixed claim of inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war").

²³¹ See *Rasul*, 124 S. Ct. at 2696–97.

²³² Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (to be codified at 42 U.S.C. §§200odd to 200odd-1).

²³³ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2762–69 (2006).

²³⁴ See *id.* at 2786–98.

reject the strong executive power theory of the right to detain terrorism suspects and dismissed out of hand the application of full criminal procedure protections to the hearings of terrorism detainees.²³⁵ In *Rasul*, the Court said little about the due process rights of alien detainees.²³⁶ In *Hamdan*, the Court once again declined to issue a broad constitutional holding. *Hamdan* rests exclusively on statutes, which Congress is free to amend or repeal.²³⁷ Indeed, Congress appears to have done just this in the Military Commissions Act of 2006.

What the Court has done in its post-9/11 terrorism cases is rein in the outliers in the constitutional controversy over the new American empire. Indeed, in the first few years of its post-9/11 jurisprudence, the Court has patched together something approximating the boundaries of the Anglo-American constitutional universe circa 1865, when British jurists struggled to locate the Morant Bay controversy in the system of British constitutionalism.

For now, the strategy has largely worked as far as the Court's reputation is concerned. American courts have so far fared much better in the realm of institutional credibility than their English predecessors did. The Morant Bay controversy set off a bitter judicial row between two of the Empire's leading judges.²³⁸ Lord Chief Justice Cockburn's grandiose, five-hour grand jury charge in the case of Nelson and Brand quickly became a source of ridicule.²³⁹ The Cockburn charge, its critics rightly noted, was "utterly indeterminate and indecisive; it laid nothing down clearly."²⁴⁰ Indeed, Cockburn's grand jury asked plaintively at the close of their service that if only for the sake of future jurors, "martial law should be more clearly defined by legislative enactment."²⁴¹ *The Times* concluded that the meaning of martial law had become a "muddle."²⁴² The U.S. Supreme Court, by contrast, has

²³⁵ See *Hamdi*, 124 S. Ct. at 2639 (plurality opinion) ("We do not reach the question whether Article II provides such authority . . ."); *id.* at 2649 (listing permissible deviations from ordinary criminal procedure).

²³⁶ The Court went only so far as to say that the petitioner-detainees' petitions described violations of U.S. law. *Rasul*, 124 S. Ct. at 2698 n.15. The Court may have meant to suggest further that the petitions described a violation of the Constitution. See Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 146-47.

²³⁷ See *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring) (clarifying that Congress may grant the President "the authority he believes necessary").

²³⁸ See KOSTAL, *supra* note 23, at 407-12.

²³⁹ See *id.* at 345-46, 365-69. Cockburn seems to have learned his lesson; he later ruled against the civil suit plaintiffs in the damages action sponsored by the Jamaica Committee against Eyre. *Id.* at 441-43.

²⁴⁰ *Id.* at 349 (quoting W.F. FINLASON, COMMENTARIES UPON MARTIAL LAW 23 (London, Stevens & Sons 1867)) (internal quotation mark omitted).

²⁴¹ *Id.* at 341 (quoting *The Jamaica Prosecutions*, DAILY TELEGRAPH (LONDON), Apr. 11, 1867, at 3) (internal quotation mark omitted).

²⁴² *Id.* at 430.

managed so far to sustain what had seemed to be a vanishing middle ground, and it has done so to considerable praise from the legal profession and many commentators.

Yet the British example described by Kostal suggests that the Court's success may be limited. The Morant Bay episode points to the limits as well as the promise of the legal frame. In the end, not one of the Jamaica Committee's suits was successful. The private criminal prosecutions failed to get past the grand jury stage (one failed even to get that far), and the civil suit the Committee sponsored failed as well. The high court judiciary, "that most venerated of English law-making institutions," Kostal writes, had failed to "furnish a coherent resolution to the problem" of the law in empire.²⁴³ All the legal controversy had made clear, as the editor of one newspaper put it, was that "the minds of judges work under the same advantages and disadvantages as do the minds of all other intelligent men."²⁴⁴

As in the eighteenth-century law of empire described by Hulsebosch, the legal frame does not seem to have accomplished much at all in the Morant Bay controversy. Leading English jurists had split badly on the meaning of martial law, and they had (as Kostal notes) divided "on more or less the same grounds as the politicians."²⁴⁵ In the end, the legal frame thus appears not to have reshaped the conversation about empire. Rather, the legal frame seems merely to have reproduced the partisan controversy over martial law, now thinly disguised as disagreement about law rather than disagreement about politics or values. In the process, the significance and value of the legal frame came into question. As the *Manchester Guardian* put it, lawyers and jurists seemed to "differ as widely as other men in the moral medium through which they regard the facts."²⁴⁶

Worse still, the legal frame may even have diverted British colonial officials and jurists from the troublesome issues at the heart of Jamaica's difficulties. The troubled political economy of post-emancipation Jamaica was sapping the strength of the recently freed people of the colony. Sugar production had fallen dramatically. White planters sought to increase the supply of wage labor even as they had precious few jobs to offer. The freed people sought land rather than wages. Yet the legal frame left out of view all of these questions, notwithstanding that they were at the heart of the Morant Bay insurrection. Given the profound economic and social crises at hand in post-

²⁴³ *Id.* at 485.

²⁴⁴ *Id.* (quoting PALL MALL GAZETTE, June 13, 1868, at 4).

²⁴⁵ *Id.* at 431.

²⁴⁶ *Id.* at 485 (quoting MANCHESTER GUARDIAN, June 10, 1868, at 4) (internal quotation marks omitted).

emancipation Jamaica, as Kostal observes, "the Government's obsession with things legal was more than passing strange."²⁴⁷

The problem in Victorian empire seems to have been that the legal materials on martial law — the cases, the statutes, the treatises — were too thin to produce a robust set of rules. Legal authorities on questions of martial law in the 1860s were few and far between. The law of empire, in other words, was not like the law of contracts or property or negotiable paper. It was not even like Finlason's chief area of expertise, the law of trusts. In these areas, myriad cases litigated over generations had produced thickly populated fields of authority. These were areas in which the legal frame regularly produced workable answers to the everyday problems lawyers faced. But in the law of empire, the patchwork of existing legal authorities failed to constrain the contending parties. Finlason, Cockburn, Stephen, and Blackburn — all of these jurists and more were able to derive ostensibly widely varying conclusions from the legal materials at hand. As a consequence, the legal frame functioned as little more than the mouthpiece of the contending sides for whatever (to put it in Professor Reid's terms) they could plausibly argue and forcibly maintain.

This is the risk for which Yoo's work has become the most convenient marker, for in our own time claims of executive power have done as much as anything else to call into question the usefulness of the legal frame. In a field notorious for the thinness of the legal authorities, law talk on all sides risks becoming little more than a thinly disguised repackaging of political or even partisan positions. *Rasul*, *Hamdi*, and *Hamdan* have for now worked a rough restoration of British constitutionalism's discursive boundaries. But each new round of developments in the United States's fight against terrorism threatens to undo the Court's embattled compromise.²⁴⁸ In the next round, it will almost certainly not be easy for the Court to maintain the fragile middle ground it has staked out so far.

And that might prove dangerous. However muddled and messy, however indeterminate and awkward, the legal frame's modest virtue is its historical association with relatively less repressive forms of global power. Kostal's most intriguing suggestion is that however much the concern for legality may have distracted from underlying social causes of unrest, the persistence of the legal frame in the British Empire helped to constrain empire's excesses, even in places like

²⁴⁷ *Id.* at 71. On the British Colonial Office's focus on court reform in Jamaica after 1865, see *id.* at 95–131, especially the discussion at *id.* at 128.

²⁴⁸ See, e.g., Military Commissions Act, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (2006) (purporting to strip the courts of jurisdiction over alien detainee habeas petitions).

Morant Bay.²⁴⁹ It is an argument that Ferguson should like and that Hulsebosch's story supports. The legal frame and the constraints it (sometimes) imposed are why the British imperial constitution will haunt American law for years to come.

²⁴⁹ See KOSTAL, *supra* note 23, at 487. See generally AFRICAN PROCONSULS: EUROPEAN GOVERNORS IN AFRICA (L.H. Gann & Peter Duignan eds., 1978) (describing the ruthlessness of European colonial officials).

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NOTE

FEDERAL FUNDING FOR NEWCOMER SCHOOLS: A BIPARTISAN IMMIGRANT EDUCATION INITIATIVE

Over the past year, immigration has gripped the nation's attention, and for good reason. Immigration is increasing at a furious rate, and the number of immigrants living in the United States is at an all-time high.¹ This surge in immigration has sparked concerns about how the children of immigrants from non-English-speaking countries — who constitute over 90% of those arriving in the United States² — should be educated.

Students from non-English-speaking backgrounds make up the fastest growing segment of the American student population: the number of students with limited English proficiency in U.S. schools has almost doubled over the past decade.³ Such students face special challenges upon arrival, not only because they do not speak the language, but also because often they have received little or no formal schooling in their native countries. The public schools in which they enroll, however, often fail to respond effectively to the needs of many of these immigrant students, who are far more likely to drop out of school than their nonimmigrant peers.⁴

To better serve high-risk immigrant populations, school districts in many states have for years experimented with a promising initiative that deserves increased federal attention: the newcomer school. Newcomer schools, which cater exclusively to non-English-speaking immigrants, are designed to help these students — particularly those who have little prior schooling — learn the English language, learn about American culture and how to balance the cultural environment at school with the native cultural environment many still find at home, and learn remedial academic content that will facilitate their transition into the mainstream classroom.⁵

¹ See Sandra Yin, Population Reference Bureau, *The United States at 300 Million* (Sept. 2006), <http://www.prb.org/Template.cfm?Section=PRB&template=/ContentManagement/ContentDisplay.cfm&ContentID=14314>.

² Katherine Stapp, *Newcomer Schools Reach Out to Older Students in the United States* (Apr. 4, 2000), <http://www2.unesco.org/wef/en-news/usa.shtm>.

³ JANA ECHEVARRIA ET AL., *SCHOOL REFORM AND STANDARDS-BASED EDUCATION 2* (2005), available at http://www.cal.org/crede/pubs/tech_report_E53C6.pdf.

⁴ See *infra* note 26 and accompanying text.

⁵ See MONICA FRIEDLANDER, *THE NEWCOMER PROGRAM: HELPING IMMIGRANT STUDENTS SUCCEED IN U.S. SCHOOLS* (Nat'l Clearinghouse for Bilingual Educ., Program Information Guide Series No. 8, 1991), available at <http://www.ncela.gwu.edu/pubs/pigs/pig8.htm>. These schools generally are meant to be temporary placements; students usually stay for six to eighteen months before moving into mainstream bilingual or English-as-a-second-language (ESL).